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ril 15, 1985

Title: T.L. Morris, Superintendent, Southern Ohio Correctional Facility, Petitioner
v.
James Michael Mathews

Court: United States Court of Appeals for the Sixth Circuit

Counsel for petitioner: Drake, Richard David

Counsel for respondent: Dane, Michael G.

try	Date	Note	Proceedings and Orders
1	Apr 15 1985	G	Petition for writ of certiorari filed.
2	May 9 1985		Brief of respondent James M. Mathews in opposition filed.
3	May 9 1985	G	Motion of respondent for leave to proceed in forma pauperis filed.
4	May 14 1985		DISTRIBUTED. May 30, 1985
5	Jun 3 1985		Motion of respondent for leave to proceed in forma pauperis GRANTED.
6	Jun 3 1985		Petition GRANTED.
			**********
7	Jul 18 1985		Joint appendix filed.
8	Jul 18 1985		Brief of petitioner R. C. Marshall, Supt. filed.
9	Aug 15 1985		Brief of respondent James M. Mathews filed.
0	Sep 6 1985		Record filed.
1	Sep 11 1985		SET FOR ARGUMENT. Monday, November 4, 1985. (1st case).
2	Sep 12 1985		CIRCULATED.
3	Nov 4 1985		ARGUED.

PETITION FOR WRIT OF CERTIORARI

CASE NO. 84-1636

Office - Supreme Court, U.S.
FILED
APR 15 1985
ALEXANDER L. STEVAS,
CLERK

In The Supreme Court of the United States

OCTOBER TERM, 1984

R.C. MARSHALL, Superintendent
Southern Ohio Correctional Facility,
Petitioner,

v.

JAMES MICHAEL MATHEWS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER, AND UNDER WHAT CIRCUMSTANCES, A VIOLATION OF THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT MAY BE REMEDIED BY MODIFYING A JEOPARDY–BARRED CONVICTION TO THAT OF A LESSER AND INCLUDED OFFENSE WHICH IS NOT JEOPARDY–BARRED.

PARTIES

The petitioner in this action is R.C. Marshall in his capacity as Superintendent of the Southern Ohio Correctional Facility at Lucasville, Ohio. The respondent is James Michael Mathews.

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DECISIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is reported as *Mathews v. Marshall,* 754 F. 2d 158 (6th Cir. 1985). (A-1). The decision of the United States District Court for the Southern District of Ohio, Western Division, is unreported. (A-11). The decision of the Ohio Court of Appeals for the Fifth Judicial District, upon remand from this Court's order in *Mathews v. Ohio,* 448 U.S. 904 (1980), is unreported. (A-21). The initial decision of the Ohio Court of Appeals for the Fifth Judicial District is also unreported. (A-29).

JURISDICTION

The opinion of the United States Court of Appeals was entered on February 1, 1985. Jurisdiction is by 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The case involves Section 1 of Amendment XIV to the Constitution of the United States:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citiznes of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny

> to any person within its jurisdiction the equal protection of the laws.

and Amendment V to the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

This case also involves Ohio Revised Code Section 2903.01 which provides in pertinent part:

> (B) No person shall purposely cause the death of another . . . while fleeing immediately after committing . . . aggravated robbery.
>
> (C) Whoever violates this section is guilty of aggravated murder. . .

and Ohio Revised Code Section 2903.02 which provides in pertinent part:

> (A) No person shall purposely cause the death of another.
>
> (B) Whoever violates this section is guilty of murder. . .

and Ohio Revised Code Section 2911.01 which provides in pertinent part:

> (A) No person, in attempting or committing a theft offense . . . shall . . .
>
> (1) Have a deadly weapon . . . on or about his person or under his control.
>
> (B) Whoever violates this section is guilty of aggravated robbery . . .

CASE NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

R.C. MARSHALL, Superintendent
Southern Ohio Correctional Facility,
Petitioner,

v.

JAMES MICHAEL MATHEWS,
Respondent.

STATEMENT OF THE CASE

The instant case comes before this Court upon the petition of the State of Ohio to review the decision of the United States Court of Appeals for the Sixth Circuit in *Mathews v. Marshall,* 754 F. 2d 158 (6th Cir. 1985). Therein, a 2–1 majority of the circuit court reversed the judgment of the United States District Court for the Southern District of Ohio and ordered that respondent be released from custody unless retried for the crime of the murder.

It is undisputed that at 1:40 p.m. on February 17, 1978, respondent James Michael Mathews and one Steven Daugherty robbed at gunpoint a federally insured bank located in Alexandria, Ohio. Upon exiting the bank, respondent and Daugherty were seen entering a distinc-

tively marked van.[1] A civilian witness became suspicious and gave law enforcement officials a complete description of the van and its license number. A police radio dispatch was broadcast to all mobile units and, within minutes, a police cruiser spotted the vehicle. A high speed chase immediately ensued and at 2:21 p.m. the pursuing officer reported the chase.[2] Three (3) minutes later [2:24 p.m.] the pursing officer radioed that the van had left the highway and that two suspects had exited the vehicle and entered a framhouse. An all points bulletin was broadcast and, within moments law enforcement officers from a variety of jurisdictions began converging upon and surrounding the farmhouse. Four (4) minutes thereafter [2:28 p.m.], the initial pursuing officer radioed that one of the suspects had exited the farmhouse and announced that they had hostages. The suspect then went to the van and returned to the farmhouse. The officer heard shots fired in the farmhouse. Four (4) minutes later [2:32 p.m.], the officer radioed that a single suspect who later proved to be the respondent herein was exiting the farmhouse with his hands in the air. The entire sequence of events, from initial pursuit to surrender, thus lasted some eleven (11) minutes. Law enforcement officers entered the farmhours and found Steven Daugherty dead. The cause of Daugherty's death will be discussed hereinafter. The officers also found the stolen bank money hidden in the house.

---

[1] Ironically, the van was a commercial vehicle which prominently displayed signs reading "Daugherty T.V.". However, respondent had earlier stolen the vehicle and his accomplish Steven Daugherty was not related to the owner.

[2] This and other precise times were verified by audio tape recordings which were automatically made of all police radio transmissions.

Respondent was taken into custody and, an hour later, made the first of a series of custodial statements. This statement was made to the prosecuting attorney. After waiving his rights, respondent was placed under oath and tendered a three (3) hour statement which was transcribed by a court reporter. The essence of this statement was that Daugherty and another individual identified only as "Cliff" had forced respondent to aid in the bank robbery by threatening to kill both respondent and his girlfriend. Respondent claimed that "Cliff" had jumped out of the van during the high speed chase. Respondent denied shooting Daugherty.

Shortly after completion of the first statement, agents of the Federal Bureau of Investigation arrived. Respondent gave a second statement to the F.B.I. agents. Therein, respondent conceeded that "Cliff" was a fictional entity and admitted that it was he and Daugherty who had planned and executed the bank robbery. Respondent, however, denied shooting Daugherty.

Two (2) days after the bank robbery, respondent tendered a third statement in which he again confessed to the armed robbery. Respondent stated that he and Daugherty stopped at the farmhouse in order to take hostages but that no one was home. Respondent stated that he went to the van and obtained the $15,866 in stolen money. Respondent also stated that he heard a single gunshot and, upon investigation, saw that Daugherty was conscious and able to call him name. Respondent stated that he hid the bank money, surrendered to the police, and then concocted the story concerning his being held at gunpoint by Daugherty and "Cliff" in order to avoid prosecution. Respondent denied shooting Daugherty.

One week after the bank robbery [February 24, 1978], the County Coroner issued a death certificate declaring Daugherty's death to be a "suicide". The certificate listed the cause of death as a 40 gauge rifle shot to the head and a 38 caliber pistol shot to the chest. This death certificate was wholly erroneous as both wounds were inflicted from the same 20 gauge sawed off shotgun. The coroner later conceeded that he issued the death certificate *prior* to receiving the results of the autopsy conducted by a forensic pathologist. It was not, however, until August 18, 1978, that the coroner issued a supplemental death certificate.

Given that the cause of death was listed as a "suicide", only the bank robbery charge was persuaded. Respondent was indicted for the crime of aggravated robbery in violation of Ohio Revised Code Section 2911.01 in that he did in ". . . committing a theft offense . . . have a deadly weapon . . . on or about his person or under his control". On May 17, 1978, respondent entered a plea of guilty and was sentenced to a term of imprisonment.

Two (2) days after his guilty plea [May 19, 1978], respondent, while in the county jail awaiting conveyance to the Ohio Penitentiary, asked to speak with the investigating officer. The officer arrived and took a tape recorded statement from respondent. Therein, respondent for the first time admitted that he shot Daugherty. Respondent stated that Daugherty had shot himself in the head but admitted that Daugherty was alive when he fired a second shot gun blast into Daugherty's chest.

On May 25, 1978, respondent, while incarcerated in the Ohio Penitentiary, made a second tape recorded statement wherein he admitted killing Daugherty. Both this and the May 19, 1978 tape recording were played to the Jury during respondent's subsequent trial.

On May 31, 1978, respondent agreed to testify before the Licking County, Ohio, Grand Jury and was returned from prison for this purpose. Before the Grand Jury, respondent recounted in detail the bank robbery and other events leading up to the death of Steven Daugherty. Respondent admitted that he was the only person in the farmhouse with Daugherty and that it would have been physically impossible for Daugherty to have fired the second, fatal shotgun blast. Respondent, however, recanted his earlier taped recorded confessions and denied shooting Daugherty.

The Grand Jury returned an indictment charging respondent with aggravated murder in violation of Ohio Revised Code Section 2903.01(B) in that he did ". . . purposely cause the death of another [Steven Daugherty] while . . . fleeing immediately after committing . . . aggravated robbery. As noted by the Ohio Court of Appeals, it was stipulated that the aggravated robbery referred to in the indictment was the same aggravated robbery to which respondent had earlier been convicted, ie., the armed robbery of the Alexandria Bank. (A-23). Respondent's pretrial motion to dismiss the aggravated murder indictment as violative of the Double Jeopardy Clause of the Fifth Amendment was denied by the state trial court.

At trial, the prosecution presented the testimony of the forensic pathologist who had conducted the autopsy of Steven Daugherty. The pathologist testified that Daugherty had sustained two (2) wounds from a single shot 20 gauge sawed off shotgun.[3] The forensic evidence revealed that the initial shot was fired while Daugherty

[3] The weapon in issue was "single shot" insofar as it would only hold one shell at a given time. Once fired, the shotgun would have to be "broken down" and another shell would have to be manually loaded in order to make the weapon again operable.

was standing and entered the left side of his face. The shotgun pellets then vertically proceeded to lodge in the ceiling.[4] None of the pellets penetrated the skull or entered the brain but the mere force of the blast would have rendered Daugherty immediately unconscious. This wound was not fatal. The second shotgun round was fired while Daugherty was in a prone position, i.e., lying on his back, and was fired directly into his heart. This shot was instantaneously fatal. The uncontroverted physical evidence demonstrated that it was medically impossible for Daugherty to have fired the second, fatal shotgun blast. As aptly stated by the Ohio Court of Appeals:

> Steven Daugherty had been shot twice with a shotgun, the first shot being to the side of the head, and the second shot being in the chest. Medical testimony indicated that the shot to the head was the first shot, and, while not the fatal shot, was of sufficeint severity to render Daugherty unconscious. Notwithstanding these facts, the Licking County Coroner ruled that the manner and mode of death was "suicide". (A-22).

Prior to trial, the prosecution and defense entered into a stipulation that respondent would take a polygraph examination and that the results of such test would be admissible at trial. See *State v. Souel,* 53 Ohio St. 2d 123, 372 N.E. 2d 1318 (1978). The polygraph operator

[4] This shot was consistent with that of a self-inflicted wound.

testified that the result indicated that respondent was being deceiptive when he denied shooting Daugherty.

While it was not incumbent upon the prosecution to establish a motive for the murder, the theory of the State's case was that respondent murdered Daugherty in order to silence him and thus prevent him from contradicting respondent's initial story to the effect that Daugherty had kidnapped respondent and forced him to aid in the bank robbery. If respondent had succeeded in convincing the authorities that he had been compelled to participate in the bank robbery, he would have both avoided prosecution and, perhaps, later recover the money which he had hidden in the farmhouse. This theory of the homicide motive was entirely consistent with the physical and testimonial evidence adduced at trial. The jury returned a verdict of guilty as charged[5] and respondent was sentenced to a term of life imprisonment.

Respondent perfected an appeal as of right to the Ohio Court of Appeals for the Fifth Judicial District. The appellate court issued an opinion affirming respondent's conviction. (A-29). The Supreme Court of Ohio declined to grant discretionary review. The Court, however, granted respondent's petition for writ of certiorari and remanded the case for further consideration in light of *Illinois v. Vitale,* 447 U.S. 410 (1980). *Mathews v. Ohio,* 448 U.S. 904 (1980).

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[5] The jury was also given an instruction on the lesser included offense of murder in violation of Ohio Revised Code Section 2903.02 which provides that "no person shall purposely cause the death of another". The sole distinction between murder and aggravated murder as defined by Ohio Revised Code Section 2903.01(B) is that the latter crime mandates that the pruposeful killing have been committed in conjunction with a specified felony.

Upon remand, the Ohio Court of Appeals issued a second decision finding respondent's aggravated murder conviction to be violative of the Double Jeopardy principles enunciated in *Illinois v. Vitale, supra.* (A-21). The appellate court held as follows:

> In applying such ruling to the case at hand, while there are other provisions upon which the conviction of aggravated murder might have been based, the indictment and the stipulation show that the State, in fact, has to rely on conduct involving the prior conviction, including all of the elements of aggravated robbery, to be able to elevate the purposeful killing (murder) to aggravated murder. The claim of the defendant-appellant herein of double jeopardy is, therefore, substantial as to the elevation of the murder charge.
>
> * * *
>
> In light of the foregoing, our reconsideration must arrive at the conclusion that the defendant's claim of double jeopardy was substantial, and it must be found to exist. Such a finding, however, is not completely dispositive of the case.
>
> * * *
>
> This case, as to ultimate disposition, differs substantially from *Vitale* in that in the *Vitale* case the prior charge upon

which defendant was convicted related directly to the death of the victim, and without such prior acts the death could not have occurred. This is not the situation before this court in that the occurred. This is not the situation before this court in that the purposeful acts causing the death of Steven Daugherty occurred separate from and apart from the operative facts of the aggravated robbery. A similar distinction exists between the other double jeopardy cases of *Harris v. Oklahoma,* 433 U.S. 682; *Brown v. Ohio,* 432 U.S. 161.

* * *

Section 2903.01(B) Revised Code defines aggravated murder as "purposely causing the death of another while committing or attempting to commit certain felonies." Section 2903.02 Revised Code defines murder simply as: "No person shall purposely cause the death of another."

Under Ohio criminal procedure an indictment includes all lesser included offenses, and a defendant may be found guilty of an inferior degree of any charge or of a lesser included offense. See Rule 31, Ohio Rules of Criminal Procedure.

In the trial of defendant-appellant, if all the facts relating to the aggravated robbery of which he was convicted are

excluded from consideration of the court and jury, the defendant was still charged with and convicted of murder in that he did purposely cause the death of Steven Daugherty on the date charged.

* * *

While defendant-appellant is entitled to protection against multiple punishment for the same offense, he is not entitled to commit and walk away from a murder based on some overlap in evidence and elements when the murder is committed independent of such overlap.

* * *

Accordingly, for the reasons set forth herein, and pursuant to the mandate of the Supreme Court of the United States filed in this cause, the judgment of conviction of aggravated murder appealed from is modified to constitute a conviction of murder, and the sentence is reduced to an indefinite term of from fifteen years to life.

The appellate court thus modified respondent's conviction to one of having "purposefully caused the death of another" in violation of Ohio Revised Code Section 2903.02 and reduced respondent's sentence accordingly. The Supreme Court of Ohio again denied respondent's motion for discretionary review. This Court denied respondent's ensuing petition for writ of certiorari.

Respondent thereafter filed a petition for writ of habeas corpus pursuant to 28 U.S.C. Section 2254 with the United States District Court for the Southern District of Ohio, Western Division. Therein, respondent contended that the modification of his conviction and sentence by the Ohio Court of Appeals was inadequate to remedy the Double Jeopardy violation. On April 19, 1982, the district court issued an opinion dismissing respondent's habeas corpus petition as without merit. (A-11). The district court reasoned as follows:

> Thus, the Ohio court would have the right to retry the defendant on a charge of murder without this being a violation of the Double Jeopardy Clause due to the former overturned conviction of aggravated murder.
>
> The Court here, however, did not do this. Instead it merely reduced the aggravated murder conviction to a murder conviction. In order to achieve this, the Ohio appellate court simply separated the element of robbery from the other two elements of intent and the act, thereby removing the taint of the double jeopardy violation. Since the trial judge clearly instructed upon each element of aggravated murder and as an alternate of murder, it is clear that the jury had to make specific findings on each step of the process. That is, the jury had to conclude that the petitioner killed Daugherty, the petitioner intended to kill Daugherty, and the petitioner was fleeing from committing the robbery at the time of the murder.

> By removing the third finding, the jury still would have found that the petitioner killed Daugherty, and that he intended to do so. Thus, without the aggravated robbery, the jury would still have found the petitioner guilty of murder.
>
> Since the result of a new trial would be the same as a reduction of the charge of murder, the reduction merely saves the State and the petitioner the burden and cost of another trial. Therefore, as an alternative to a retrial of the petitioner, the Ohio appellate court had the power to reduce the conviction to the lesser included offense of murder in order to purge the taint of the constitutional violation. (A-18, A-19).

Respondent filed a notice of appeal and was granted a certificate of probable cause. Subsequent to briefing and argument, the United States Court of Appeals for the Sixth Circuit issued a 2–1 decision reversing the district court judgment and ordering that respondent be released unless the State of Ohio retried him for the crime of murder.[6] *Mathews v. Marshall*, 754 F 2d 158 (6th Cir. 1985). (A-1). The majority acknowledged that a clear split of authority existed among the federal circuit courts.

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[6] As one of the stated purposes of the Double Jeopardy Clause is to *prevent* multiple prosecutions, it is anomolous that a second trial has been mandated in order to cure a perceived violation of that Fifth Amendment provision.

754 F. 2d 160-161. The majority rejected the Fifth Circuit analysis articulated in *Tapp v. Lucas,* 658 F. 2d 383 (5th Cir. 1981), *cert. denied,* 456 U.S. 972 (1982) and, instead, embraced the Second Circuit rationale stated in *Graham v. Smith,* 602 F. 2d 1078 (2nd Cir. 1979), *cert. denied,* 444 U.S. 995 (1979). Specifically, the majority stated that:

> We therefore agree with the Second Circuit that a conviction obtained in violation of the double jeopardy clause cannot be modified if the defendant can show that there was a "reasonable possibility that he was prejudiced" by the double jeopardy violation. *Graham,* 602 F. 2d at 1083. "[A]n exceedingly small shoing. . .would suffice" to demonstrate such a possibility of prejudice. Id. 754 F. 2d at 162. (A-8).

The majority held that evidence regarding the bank robbery that was admitted during respondent's state court aggravated murder, i.e., murder while fleeing from an armed robbery, would be inadmissible in a prosecution for "simple" murder.

In his dissent, Judge Brown correctly demonstrated the fallacy of the majority reasoning by stating:

> The reason there is a possibility that Mathews was so prejudiced, the majority opinion holds, is that "evidence was admitted in his trial for aggravated murder that would not have been admissible in a trial for murder."

> It will be remembered that Mathews and one Daugherty had robbed a bank and, while pursued by police were surrounded in a farm house. Shortly, two shots were fired and Daugherty was found dead, shot in the head and chest.
>
> It is far from clear to me that, under the ordinary rules of evidence, the State would not, in a murder trial, have been allowed to prove the surrounding circumstances, including the facts surrounding the just-completed bank robbery. 754 F. 2d at 162. (A-9, A-10).

Judge Brown went on to emphasize that the question before a federal court reviewing a state court conviction is whether the inmate was deprived of a right secured by the United States Constitution. Judge Brown noted that the majority was vacating a presumptively valid state court conviction for what was, at most, mere trial court error of nonconstitutional proportions regarding the admission of evidence. Judge Brown stated the fundamental significance of such error as follows:

> More importantly, admission of such proof would not rise to a federal constitutional violation, and we are here dealing with the question whether, by reducing Mathews' conviction to murder, he has been deprived of a federal constitutional right. I do not think so and therefore dissent. 754 F. 2d at 162. (A-10).

The State of Ohio now petitions this Court to review the judgment of the court below and resolve the conflict among the federal circuit courts.

ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

The instant case presents an substantial issue of national importance regarding the Double Jeopardy Clause of the Fifth Amendment. The question is whether — and, if so, under what circumstances — a violation of the double jeopardy principles articulated by this Court in *Illinois v. Vitale,* 447 U.S. 410 (1980) and *Brown v. Ohio,* 432 U.S. 161 (1977) may be remedied by vacating a jeopardy-barred conviction and modifying such conviction and attendent sentence to that of a lesser and included offense which is consistent with the Double Jeopardy Clause.

Among other prohibitions, the Double Jeopardy Clause of the Fifth Amendment forbids a second prosecution for the same offense subsequent to conviction. *North Carolina v. Pearce,* 395 U.S. 711, 717 (1969). When the same transaction is alleged to have violated multiple criminal statutes, the "same offense" question " . . . is whether each provision requires proof of a fact which the other [statute] does not." *Blockburger v. United States,* 284 U.S. 294, 304 (1932). As a lesser and included offense has no elements different from its greater offense, the two are definitionally the "same" for double jeopardy purposes and a second prosecution for one is precluded subsequent to conviction on the other irrespective of the sequence of the convictions. *Brown v. Ohio,* 432 U.S. 161, 169 (1977).

Respondent herein was initially convicted of aggravated robbery in violation of Ohio Revised Code Section 2911.01.[7] Respondent was thereafter convicted of aggravated murder in violation of Ohio Revised Code Section 2903.01(B).[8] Upon remand from this Court's decision in *Mathews v. Ohio,* 448 U.S. 904 (1980), the Ohio Court of Appeals recognized that aggravated robbery was a lesser and included offense of the aggravated murder as charged and that the aggravated murder conviction was, accordingly, jeopardy barred. The appellate court, however, also recognized that murder as defined by Ohio Revised Code Section 2903.02[9] is also a lesser and included offense of aggravated murder. As the jury, of necessity, found respondent guilty of murder beyond a reasonable doubt, the state appellate court vacated the jeopardy barred conviction and modified it to that of the constitutionally permissible conviction. The issue presented herein is whether such remedial action is sufficient to cure the double jeopardy violation.

The question of the adequacy of the modification remedy has divided the federal circuit courts. The Fifth Circuit has clearly approved the remedy. In *Tapp v. Lucas,* 658 F. 2d 383 (5th Cir. 1981), *cert. denied,* 456 U.S. 972 (1982), the court considered a case factually similar to that herein and stated:

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[7] No person. . .in committing a theft offense. . .shall. . .have a deadly weapon. . .on or about his person.

[8] *No person shall purposely cause the death of another. . .*while fleeing immediately after committing. . .aggravated robbery. [emphasis added]

[9] No person shall purposely cause the death of another.

The jury's verdict that Tapp was guilty of murder means a fortiori that the jury considered Tapp guilty of the lesser included offense of manslaughter as well. Thus, the possibility of prejudicial jury compromise is simply absent from this case. Moreover, there is nothing to suggest that the Mississippi Supreme Court was swayed by the presence of a murder charge which it recognized to be barred by the double jeopardy clause. *The court's remand for resentencing on the lesser included manslaughter offense was a common sense solution to the problem of avoiding yet another trial for prosecution and defense.* It was in no way inconsistent with the double jeopardy clause. 658 F. 2d at 386. [Emphasis added]

In contrast, the Second and, now, the Sixth Circuit reject the Fifth Circuit approach. These circuits hold that a jeopardy barred conviction cannot be modified if the defendant alleges that there was a reasonable possibility that he was prejudiced and further hold that "an exceedingly small showing. . .would suffice" to demonstrate such a possibility of prejudice. *Graham v. Smith,* 602 F. 2d 1078, 1083 (2nd Cir. 1979), *cert. denied,* 444 U.S. 995 (1979).[10] As the instant case aptly demonstrates, the threshold test embraced by the Second and Sixth Circuits is such so as to make any

[10] The *Graham v. Smith, supra* decision is based upon the opinion authored by then Judge Thurgood Marshall in *United States ex rel. Hentenyi v. Wilkins,* 348 F. 2d 844 (2nd Cir. 1965), *cert. denied,* 383 U.S. 913 (1966).

possibility of modification illusory. This Court should grant a writ of certiorari in order to resolve the conflict among the federal circuits.

The majority opinion of the circuit court below, as correctly noted by Judge Brown in his dissent, distorts the function of a federal court reviewing a state court conviction. A court sitting in a federal habeas corpus action is empowered to vacate a presumptively valid state court conviction only upon a demonstration by the inmate that his conviction is repugnant to the United States Constitution. 28 U.S.C. Section 2241(c)(3). In the instant case, the majority has, *at most,* held that the state trial court erred in allowing the admission of certain evidence concerning the bank robbery. However, the possibility of such a spill over effect is present in any trial involving either multiple counts or multiple defendants. The holding of the majority is tantamount to a declaration that a literal variety of non-constitutional errors, e.g., misjoinder of offenses, will afford a basis upon which a federal court may vacate a state court conviction.

The abuse of the majority below is particularly pervasive. The entire theory of the prosecution case was that respondent committed the murder in order to both silence Daugherty and thus avoid prosecution for the *aggravated robbery* and, hopefully, to thereafter return and obtain the money which he had hidden and which he had obtained as a result of the *aggravated robbery.* Thus, assuming that respondent had been tried only for murder, evidence of the bank robbery clearly would have been admissible pursuant to Rule 404 of the Ohio Rules of Evidence which provides:

> (B) Other crimes, wrongs or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Indeed, if respondent is retried pursuant to the mandate of the court below, the very evidence which the majority found offensive will once again be admitted in order to demonstrate the motive and intent of respondent in committing the murder.

A petition for writ of certiorari should be granted in order to review the lower court judgment and resolve the conflict in the federal circuits.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that the requite number of copies of the foregoing Petition for Writ of Certiorari have been served on respondent, James Michael Mathews, by forwarding such copies through the office of his counsel. Michael G. Dane, Assistant Public Defender, 2015 Superior Building, Cleveland, Ohio 44114, by United States Mail, postpaid, this _____ day of April, 1985. I further certify that all parties required to be served have been so served. Respondent's address is the Southern Ohio Correctional Facility at Lucasville, Ohio.

RICHARD DAVID DRAKE
Assistant Attorney General

APPENDIX

Page

Opinion, February 1, 1985, United States Court of Appeals for the Sixth Circuit, *Mathews v. Marshall,* 754 F. 2d 158 (6th Cir. 1985), reversing district court judgment. A-1

Opinion, April 19, 1983, United States District Court for the Southern District of Ohio, Western Division, dismissing petition for writ of habeas corpus A-11

Opinion, November 7, 1980, Ohio Court of Appeals for the Fifth Judicial District, upon remand from this Court's order in *Mathews v. Ohio,* 448 U.S. 904 (1980), modifying the state trial court judgment A-21

Opinion, August 9, 1979, Ohio Court of Appeals for the Fifth Judicial District, initially affirming the state trial court judgment. A-29

No. 83–3587

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES MICHAEL MATHEWS,
Petitioner-Appellant,

v.

RONALD C. MARSHALL,
Respondent-Appellee.

ON APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed February 1, 1985

[file stamp deleted]
Received Febraury 4, 1985

Before: MARTIN and JONES, Circuit Judges; and BROWN, Senior Circuit Judge.

MARTIN, Circuit Judge, delivered the opinion of the Court, in which JONES, Circuit Judge, concurred. BROWN, Senior Circuit Judge, (p.9) delivered a separate dissenting opinion.

BOYCE F. MARTIN, JR., Circuit Judge. James Michael Mathews appeals the district court's dismissal of his habeas corpus petition. Mathews claims that his sentence for murder violates the double jeopardy clause of the fifth amendment. For the reasons discussed below, we reverse the district court's decision and grant the petition for habeas corpus.

On February 17, 1978, Mathews and Steven Daugherty robbed a bank in Alexandria, Ohio. The

police pursued Mathews and Daughtery following the robbery and surrounded them in a farm house. After a short time, Mathews surrendered, and the police entered the farm house. They found Daugherty dead, shot once in the head and once in the chest. At the time, the coroner ruled that the death was suicide.

Mathews subsequently was indicted under the Ohio Rev. Code Ann. Section 2911.01 on armed robbery charges.[1] He pled guilty to these charges and was sentenced on May 17, 1978. On June 1, 1978, Mathews was indicted under Ohio Rev. Code Ann. Section 2903.01 for the aggravated murder of Steven Daughtery, and on September 1, 1978, a jury found him guilty of that crime[2] Mathews was sentenced to life imprisonment.

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[1] Ohio Rev. Code Ann. Section 2911.01 (Baldwin 1982) states:

(A) No person, in attempting or committing a theft offense as defined in section 2913.01 of the Revised Code, or in fleeing immediately after such attempt or offense, shall do either of the following:

(1) have a deadly weapon or dangerous ordnance as defined in section 2923.11 of the Revised Code on or about his person or under his control;

(2) Inflict, or attempt to inflict serious physical harm on another.

(B) Whoever violates this section is guilty of aggravated robbery, a felony of the first degree.

[2] Ohio Rev. Code Ann. Section 2903.01 (Baldwin 1982) states:

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting ot commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

Mathews appealed his aggravated murder conviction, claiming that his trial for aggravated murder following his conviction for aggravated robbery violated the double jeopardy clause. The Ohio Court of Appeals affirmed his conviction, and the Ohio Supreme Court denied Mathews' motion for leave to appeal. The United States Supreme Court, however, granted certiorari, vacated the conviction, and remanded the case for further consideration in light of *Illinois v. Vitale,* 447 U.S. 410 (1980). *Mathews v. Ohio,* 448 U.S. 904 (1980).

In *Illinois v. Vitale,* the Supreme Court reaffirmed the test articulated in *Blockburger v. United States,* 284 U.S. 299, 304 (1932), for determining whether a defendant is being prosecuted for the same offense for double jeopardy purposes. *Vitale,* 447 U.S. at 416. "[T]he test to be applied to determine whether there are two offenses or only one, is whether *each* [statutory] provision requires proof of a fact which the other does not." *Id.* (quoting *Brown v. Ohio,* 432 U.S. 161, 166 (1977)) (emphasis added). In applying this test, the Court stated that the courts should focus "on the proof necessary to prove the statutory elements of each offense, rather than on the actual evidence to be presented at trial." Yet when a statute has alternative statutory elements, as does the aggravated murder statute in this case, the *Vitale* Court recognized that the courts, before applying the *Blockburger* test, should examine the particular case to determine which statutory elements the state is actually trying to prove. *Id.* at 418-19. *See also Whalen v. United States,* 445 U.S. 684, 694 (1977); *Pandelli v. United States,* 635 F.2d 533, 536 (6th Cir. 1980); *Pryor v. Rose,* 724 F.2d 525, 529 (6th Cir. 1984). Thus, where an element of aggravated murder is a felony such as rape or armed robbery, the court must determine which felony the state is trying to prove to determine whether there is double jeopardy.

On remand, the Ohio Court of Appeals recognized that under *Vitale,* aggravated robbery was the same offense as aggravated murder and that Mathews' protection from double jeopardy had been violated by his second trial. Instead of vacating Mathews' aggravated murder conviction, however, the Court of Appeals modified his aggravated murder conviction to a murder conviction, which did not require a showing that the murder was in connection with a felony. Mathews' life sentence was accordingly reduced from a life sentence to fifteen years to life.

In denying Mathews' petition for habeas corpus, the district court approved of the state court's application of *Vitale.* The district court recognized that it must look to the actual elements of the offense that the state is trying to prove in applying the double jeopardy clause. Because the state convicted Mathews of aggravated murder based on an aggravated robbery for which he had already been convicted, the district court concluded that the offense were the same for double jeopardy purpose and that Mathews had been unconstitutionally convicted of aggravated murder. The district court, however, found that the reduction of Mathews' sentence from aggravated murder to murder cured the constitutional violation.

In this appeal, the state concedes that Mathews' trial for aggravated murder violated the double jeopardy clause. The state argues, however, that the reduction of Mathews' sentence to murder removed any constitutional error. The state reasons that aggravated murder includes three elements: (1) the felony; (2) the act; and (3) the intent to kill. On the other hand, murder requires proof of only two elements: (1) the act and (2) the intent to kill. The state contends that by finding Mathews guilty of the elements of aggravated murder, the jury

necessarily found Mathews guilty of the included elements of murder. The state concludes that the reduction of Mathews' sentence to murder removed the felony element and thus the double jeopardy taint, and that a new trial for murder would be a waste of judicial resources.[3]

Mathews concedes that he could have been tried for murder without violating the double jeopardy clause and that he could still be tried for murder if we reversed his current sentence.[4] Mathews, however, maintains that his whole trial for aggravated murder contravened the double jeopardy clause and that a constitutionally valid conviction cannot be a product of a constitutionally defective trial. Mathews would thus have us adopt a broad rule that the only remedy for a trial in contravention of the double jeopardy clause is a new trial.[5]

Although Mathews' argument is somewhat appealing, there is precedent directly to the contrary. In *Tapp v. Lucas,* 658 F.2d 383 (5th Cir. 1981), Tapp had been convicted of murder after his first conviction for man-

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[3] Both parties agree that Mathews' trial for aggravated murder would not foreclose a new trial for murder. The Supreme Court has consistently recognized that the reversal of a conviction on procedural grounds does not preclude the government from retrying a defendant. *See United States v. Tateo,* 377 U.S. 463, 465 (1964).

[4] *See Supra* n.3.

[5] We find Mathews' argument that *Menna v. New York,* 423 U.S. 61 (1975), is directly controlling on this point not to be convincing. In *Menna,* the Supreme Court, in a very short opinion, stated that "federal law require[s] that a conviction on [a] charge [in violation of the double jeopardy clause] be set aside." *Id.* at 62. This language was not, however, directed to the specific question presented in this case and was more a general admonition than a precise holding.

slaughter was reversed for evidentiary error. On appeal, the Mississippi Supreme Court recognized that his second trial for murder violated the double jeopardy clause because the jury had implicitly found him innocent of murder by convicting him of the lesser-included offense of manslaughter in the first trial. Instead of granting the petitioner a new trial, however, the Mississippi Supreme Court ordered the trial court to reduce Tapp's murder sentence to manslaughter.

The Fifth Circuit upheld the state court's modification of Tapp's sentence. The court reasoned that because Tapp was found guilty of murder, "the jury considered Tapp guilty of the lesser included offense of manslaughter as well." *Id.* at 386. The court then noted that Tapp was not prejudiced at trial by his prosecution for the greater offense and concluded the sentence modification was "a common sense solution to the problem of avoiding yet another trial for prosecution and defense." *Id.*

A similar case is *Graham v. Smith,* 602 F.2d 1078 (2d Cir. 1979). In that case, Graham was convicted of second-degree murder after his first conviction for manslaughter was overturned. A state appellate court modified Graham claimed that his murder conviction violated the double jeopardy clause.

In reviewing the case on a habeas petition, the Second Circuit refused to adopt a rule that would have "deprived [the state] of any conviction on a trial that had included a charge barred by double jeopardy." The court instead decided that a trial tainted by an impermissible charge could still produce a valid conviction unless the defendant can show a *"reasonable possibility* that he was prejudiced." *Id.* at 1083 (quoting *United States ex rel Hentenyi v. Wilkins,* 348 F.2d 844 (2d Cir.

1965), *cert. denied,* 383 U.S. 913 (1966)) (emphasis in original). Applying this standard, the Court concluded that Graham may have been prejudiced because he felt forced to testify to defend the greater offense while he may not have testified if charged only with manslaughter.

These cases are very similar to the present case. In all of these cases, the defendants were convicted of greater offenses in trials that violated the double jeopardy clause. In each case, their convictions were modified to convictions that would have been permissible. Although Mathews attempts to distinguish *Tapp* and *Graham* on the ground that they involved a prosecution following an acquittal and his case involves a prosecution following a conviction for the same crime, we find that this is a distinction without a difference. Thus, if the reasoning in *Graham* and *Tapp* is sound, they should be applicable to the case.

Unfortunately, the reasoning in neither of those cases is well developed. In *Tapp,* the Fifth Circuit apparently relied on the practical convenience of avoiding a new trial. The Second Circuit in *Graham* simply expanded on related precedent. We believe, however, that we must examine the purposes behind the double jeopardy clause in deciding whether sentence modification is an acceptable remedy.

The basic policy underlying the double jeopardy clause is that the state "should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarassment, expense and ordeal and compelling him to live in a continuing state of anxiety, and insecurity. . . ." *Green v. United States,* 355 U.S. 184, 187-88 (1957). The

double jeopardy clause therefore promotes finality, whether the defendant was initially convicted or acquitted. *Brown v. Ohio,* 432 U.S. 161, 165-66 (1977).

In light of this policy, a per se rule that a defendant is always entitled to a new trial for a double jeopardy violation would not be logical. When a new trial is granted, the defendant undergoes the anxiety and expense that the double jeopardy clause is attempting to avoid. Just because the defendent himself is willing to face a new trial does not mean that we should grant such a trial if it would be a futile exercise.

At the same time, however, we cannot allow the state to profit from violations of the double jeopardy clause. For example, the state cannot prosecute a charge in violation of the double jeopardy clause in the hope that the jury will convict the defendant of a lesser included offense. *See Tapp,* 658 F.2d at 385-86; *Graham,* 602 F.2d at 1082. *See also Price v. Georgia,* 398 U.S. 323, 331 (1970). We therefore agree with the Second Circuit that a conviction obtained in violation of the double jeopardy clause cannot be modified if the defendant can show that there was a "reasonable possibility that he was prejudiced" by the double jeopardy violation. *Graham,* 602 F.2d at 1083. "[A]n exceedingly small showing. . . would suffice" to demonstrate such a possibility of prejudice. *Id.*

In this case, Mathews claims that he was prejudiced because evidence was admitted in his trial for aggravated murder that would not have been admissible in a trial for

murder.[6] Mathews points to statements made by him about the robbery that put his credibility in issue before he even had decided whether to testify, testimony about a stolen vehicle used in the robbery, and weapons and a ski mask used only in the robbery. We agree that the admission of such evidence may have prejudiced the jury with regard to its findings as to intent and to the act itself, and we therefore find that Mathews is entitled to a new trial on the murder charge.

The district court's decision is reversed, and the case is remanded to that court with directions to issue the writ unless Mathews is retried within sixty days from the issuance of our mandate or such further time as the district court, for good cause shown, may allow.

BAILEY BROWN, Senior Circuit Judge. I respectfully dissent and would affirm District Judge Spiegel's denial of habeas relief.

The majority opinion is bottomed on the proposition, following *Graham v. Smith,* 602 F.2d 1078 (2d Cir. 1979), that there is a *"reasonable possibility* that [Mathews] was prejudiced," *id.* at 1083 (quoting *United States ex rel Hentenyi v. Wilkins,* 348 F.2d 844, 864 (2d Cir. 1965) (Marshall, J.), *cert. denied,* 383 U.S. 913 (1966)) (emphasis in original), by his trial for aggravated murder rather than murder. The reason there is a possibility that Mathews was so prejudiced, the majority opinion holds, is that "evidence was admitted in his trial for aggravated murder that would not have been admissible in a trial for murder." (Slip at 8).

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[6] The state's argument that Mathews failed to exhaust his remedies as to this claim is unconvincing. Mathews has consistently claimed that his protection against double jeopardy has been abridged. The reasoning why his double jeopardy rights were violated need not be fully developed at each stage of the appellate process.

It will be remembered that Mathews and one Daugherty had robbed a bank and, while pursued by police, were surrounded in a farm house. Shortly, two shots were fired and Daugherty was found dead, shot in the head and chest.

It is far from clear to me that, under the ordinary rules of evidence, the State would not, in a murder trial, have been allowed to prove the surrounding circumstances, including the facts surrounding the just-completed bank robbery. More importantly, admission of such proof would not rise to a federal constitutional violation, and we are here dealing with the question whether, by reducing Mathews' conviction to murder, he has been deprived of a federal constitutional right. I do not think so and therefore dissent.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JAMES MICHAEL MATHEWS,
Petitioner,

vs.

R.C. MARSHALL, SUPT.,
Respondent.

No. C–1–81–834

OPINION AND ORDER

RECEIVED April 26, 1983
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SPIEGEL, J.:

This matter is before this Court on the petition for a writ of habeas corpus (doc. 2) and respondent's return of writ (doc. 4). The petitioner, presently incarcerated in the Southern Ohio Correctional Facility, has brought his habeas corpus action pursuant to 28 U.S.C. Section 2254. He was granted leave to proceed *in forma pauperis* and is proceeding *pro se.*

The petitioner was first charged with aggravated robbery on February 17, 1980 (No. 78-A-13872). As a result of the petitioner entering a plea of guilty, petitioner was convicted and sentenced on the aggravated robbery charge. Subsequent to this, the petitioner was indicted by the Licking County, Ohio Grand Jury on a charge of the aggravated murder of Steven Daughtery pursuant to O.R.C. Section 2903.01.

At trial, evidence was brought forward showing that on February 17, 1978, the petitioner and Steven Daughtery robbed the Alexandria Bank in Alexandria, Ohio. When they left the bank, they were pursued by a police officer to the Newhouse residence. Once there, Daughtery and the petitioner entered the house, shots were fired, and petitioner came out and surrendered to the police. Daughtery had been shot twice, the second shot killing him. Apparently, the first shot had rendered him unconscious. Notwithstanding this evidence, the Licking County Coroner found the manner of death to be "suicide."

Upon the conclusion of the trial, the judge instructed the jury on all elements of aggravated murder including an instruction on the intent element (tr. 806-09). As an alternative, the judge instructed the jury upon the elements of murder if the jury found that the death was not caused in connection with the robbery (tr. 809).

The jury returned a verdict of guilty of aggravated murder and the judge sentenced the petitioner to life imprisonment. *State v. Mathews,* No. 78-A-13940 (Licking Cty. Ohio Com. Pleas Sept. 1, 1978). This conviction was affirmed by the Ohio Court of Appeals, Fifth Circuit, *State v. Mathews,* No. CA2578 (Licking Cty. Ct. App. August 8, 1979). Thereafter, petitioner's motion for leave to appeal to the Ohio Supreme Court was overruled, *State v. Mathews,* No. 79-1342 (Ohio. S.Ct. Dec. 7, 1979).

Subsequently, the petitioner petitioned for writ of certiorari to the United States Supreme Court challenging his conviction on the grounds of double jeopardy. That Court granted the petition, vacated the judgment of conviction, and remanded the case to the Court of Appeals of Ohio, Fifth District, for further consideration

in light of *Illinois v. Vitale,* 447 U.S. 410 (1980). In *Vitale,* the U.S. Supreme Court held that if one offense always requires proof of another offense, then the defendant cannot be convicted of the latter and subsequently convicted of the former. Moreover, even if the prosecutor need not always show the occurrence of the offense the defendant has already been convicted of to prove the present offense, if he had to do so in this particular instance, the defendant still has a substantial claim of double jeopardy. *Id.* at 419-20.

Upon remand, the Court of Appeals modified the conviction of aggravated murder to murder and thereby reduced petitioner's sentence to an indefinite term of fifteen years to life. No. 2578 (Licking Cty., Ohio Ct. App. Nov. 7, 1980). Once again, the petitioner's motion to appeal to the Ohio Supreme Court was denied and a similar petition was denied by the United States Supreme Court, No. 80-1837 (U.S. S.Ct. May 7, 1981). Thus, petitioner, having exhausted his state remedies, brought this action on a writ of habeas corpus.

There are two major issues involved in this petition. The first is whether the conviction of aggravated murder subsequent to the conviction of aggravated robbery was a violation of the Double Jeopardy Clause of the Fifth Amendment, applicable to the state through the Fourteenth Amendment by *Benton v. Maryland,* 395 U.S. 784 (1969). The second is, if the petitioner has a substantial claim of double jeopardy, whether the Ohio court can cure this constitutional violation by reducing the aggravated murder charge to murder.

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offense to be put in jeopardy of life or limb." This guarantee has been held to protect against three occurrences:

1. A second prosecution for the same offense after acquittal;

2. A second prosecution for the same offense after conviction; or

3. Multiple punishments for the same offense.

North Carolina v. Pearce, 395 U.S. 711, 717 (1969) (footnotes omitted). The test to determine whether the violation has occurred in one of these instances was set down long ago in *Blockburger v. United States,* 284 U.S. 294 (1932). When the same occurrence is alleged to violate two statutes, then the question "is whether *each* provision requires proof of a fact which the other does not." *Id.* at 304, relying on *Gavieres v. United States,* 220 U.S. 338, 342 (1911) (emphasis added). Clearly this is applicable to greater and lesser included offenses. Though the greater offense has elements the lesser does not, the lesser offense has no elements different from the greater offense. "The greater offense is, therefore, by definition the 'same' for purpose of double jeopardy as any lesser offense included in it." *Brown v. Ohio,* 432 U.S. 161, 169 (1977). *See also Harris v. Oklahoma,* 433 U.S. 682 (1977). This fact is applicable to greater and lesser included offenses whatever the sequence of the convictions. *Brown v. Ohio,* 432 U.S. at 169.

It is important to note that this case involves a subsequent prosecution, in contrast to multiple punishments. The relevancy of this distinction becomes clear when we consider the effect of each upon the defendant. Whenever the case involves multiple sentencing in the same trial, the legislature's intent is at issue since it is within the legislature's discretion to determine the level

of sentencing appropriate for a particular crime. Thus *Whalen v. United States,* 445 U.S. 684 (1980), *Missouri v. Hunter,* 51 U.S.L.W. 4093 (Jan. 19, 1983), and *Pandelli v. United States,* 365 F.2d 533 (6th Cir. 1980) all hold that if there exists clear legislative intent permitting multiple punishments, then there is no double jeopardy. It is only after a determination that the legislature did not intend multiple punishments that the *Blockburger* test is applied. Here, however, the petitioner was first prosecuted and convicted of aggravated robbery and *subsequently* convicted of aggravated murder. Whenever the case involves a trial and conviction occurring subsequent to another trial and conviction, the legislature's intent loses its importance, for it is no longer just an increase in sentence; rather it now includes a second trial, and one of the main protections of the Double Jeopardy Clause is against subsequent prosecution for the same offense.

Therefore, we must begin by applying the *Blockburger* test to the aggravated murder statute to determine if it is the "same" for double jeopardy purposes as aggravated robbery. The aggravated murder statute as applicable here states:

> No person shall purposely cause the death of another while. . .fleeing immediately after committing. . .kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape. Ohio Revised Code Section 2903.01(B).

Clearly, the elements of aggravated robbery need not be proven in every case of aggravated murder. However, if the State, in this case, had to prove aggravated robbery in

order to prove aggravated murder, the petitioner still has a substantial claim of double jeopardy. *United States v. Vitale,* 477 U.S. 410, 420 (1980). Thus, "the requisite statutory elements must be examined from the vantage point of the particular case before the court." *Pandelli v. United States,* 635 F.2d at 536. In order to examine the statute from the vantage point of this case, we treat each alternative in the statute as a separate statutory offense for purposes of double jeopardy and then see if the murder and the underlying felony are the "same" under *Blockburger. Id.* at 537.

In this case, in order to convict petitioner of aggravated murder, the state had to prove that the petitioner had committed aggravated robbery. As a result under *Vitale,* the petitioner had a substantial claim of double jeopardy.

This does not end the matter, however, for the issue remains as to whether the Ohio court's action of reducing the charge to murder cured the constitutional violation.

In many felony murder statutes, the underlying felony will provide practically all the elements of murder, except the actual act of killing. Thus, when a conviction occurs on both the felony and the murder, double jeopardy arises and the proof of the felony is indistinguishable from the proof of the murder. As a result, the only remedy is reversal of the conviction. *Pryor v. Rose,* No. 81-5401 (6th Cir. Jan. 26, 1983).

The situation in Ohio is different, however. In Ohio's aggravated murder statute, there are three separate elements which must be proven:

1. The felony;
2. The act; and
3. The intent.

The proof for one element cannot supply the proof of the other elements. *Carter v. Jago,* No. 79-3317 (Dec. 12, 1980). Thus, the felony element cannot supply the intent for the murder. This is what makes the Ohio aggravated murder statute different from other "felony murder" statutes.

In comparison to the charge of aggravated murder statute states:

> No person shall purposely cause the death of another. O.R.C. Section 2903.02.

Thus, the elements of murder require proof of:

1. The act; and
2. The intent to kill.

In short, murder, as well as aggravated robbery, is a lesser included offense of aggravated murder.

It is because the murder is the lesser included offense of the aggravated murder that there is a question whether after a finding of double jeopardy, the Ohio courts could retry the defendant on the lesser included offense. The United States Supreme Court has stated that, in general, "the principle that . . . [the Double Jeopardy Clause] does not preclude the government's retrying a defendant whose conviction was set aside because of an error in the proceedings leading to a conviction is a well-established part of our constitutional juris-

prudence." *United States v. Tateo,* 377 U.S. 463, 465 (1964); *See United States v. Ball,* 163 U.S. 662, 672 (1895); *See also Stroud v. United States,* 251 U.S. 15 (1919); *North Carolina v. Pearce,* 395 U.S. 711 (1969). This applies anytime the reversal and appeal is based on trial error, for "reversal for trial error. . .does not constitute a decision to the effect that a defendant has been convicted through a judicial process which is defective in some fundamental respect." *Burks v. United States,* 437 U.S. 1, 15 (1978). Thus, the reason for granting a new trial is to correct the trial error. Here, the trial error lay in the judge instructing the jury that they could convict the petitioner of aggravated murder. By granting a new trial on the issue of murder, this trial error would be corrected, while not allowing a new trial would mean the murder charge would go unadjudicated. "It would be high price indeed for society to pay for every accused granted immunity from punishment because of any defect sufficient to constitute reversable error in the proceedings leading to conviction." *United States v. Tateo,* 377 U.S. at 466. Thus, the Ohio court would have the right to retry the defendant on a charge of murder without this being a violation of the Double Jeopardy Clause due to the former overturned conviction of aggravated murder.

The Court here, however, did not do this. Instead it merely reduced the aggravated murder conviction to a murder conviction. In order to achieve this, the Ohio appellate court simply separated the element of robbery from the other two elements of intent and the act, thereby removing the taint of the double jeopardy violation. Since the trial judge clearly instructed upon each element of aggravated murder and as an alternate of murder, it is clear that the jury had to make specific findings on each step of the process. That is, the jury

had to conclude that the petitioner killed Daughtery, the petitioner intended to kill Daughtery, and the petitioner was fleeing from committing the robbery at the time of the murder. By removing the third finding, the jury still would have found that the petitioner killed Daughtery, and that he intended to do so. Thus, without the aggravated robbery, the jury would still have found the petitioner guilty of murder.

Since the result of a new trial would be the same as a reduction of the charge of murder, the reduction merely saves the State and the petitioners the burden and cost of another trial. Therefore, as an alternative to a retrial of the petitioner, the Ohio appellate court had the power to reduce the conviction to the lesser included offense of murder in order to purge the taint of the constitutional violation.

The State also claims that this case fits under the exception stated in *Brown* that the State could convict a defendant on a more serious charge where "the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence . . ." 432 U.S. at 169 n.7. The State claims this because the Coroner's report stated the manner of death as being "suicide." However, the Ohio appellate court found this to be without merit since a finding by the Coroner as to the manner of death is beyond his scope. No. 2578 at 19 citing *State ex rel, Dana v. Gerber,* 79 Ohio App. 1 (1946). We find the Ohio court's determination on this matter persuasive.

Therefore, though petitioner's claim of double jeopardy is substantial, the Ohio court has effectively cured the constitutional violation. As a result, the writ of habeas corpus is without merit and is hereby denied. This action is dismissed and judgment shall be entered for the respondent.

SO ORDERED.

/s/ S. Arthur Spiegel
S. Arthur Spiegel
United States District Judge

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO FIFTH APPELLATE DISTRICT

STATE OF OHIO,
Plaintiff-Appellee,

vs.

JAMES MICHAEL MATHEWS,
Defendant-Appellant.

OPINION

Case No. 2578

Decided: _____

[file stamp deleted]

APPEARANCES:

ROBERT L. BECKER,
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ATTORNEYS FOR DEFENDANT–APPELLANT

This case is again before this court upon remand from the Supreme Court of the United States, the Supreme Court having granted a petition for a writ of certiorari filed by the defendant herein, and having adjudged on June 30, 1980, that the former judgment of this court be vacated and remanded for further consideration in light of *Illinois v. Vitale,* 447 U.S. _____ (1980).

The relevant facts follow.

On February 17, 1978, appellant and one Steven Daugherty robbed the Alexandria Bank at Alexandria, Ohio. They left the scene in a motor vehicle which was followed to the residence of a family named Newhouse. After a short time, appellant came out of the house and surrendered to the police. After appellant was in custody, the police entered the farm house and found Steven Daugherty dead. Steven Daugherty had been shot twice with a shotgun, the first shot being to the side of the head, and the second shot being in the chest. Medical testimony indicated that the shot to the head was the first shot, and, while not the fatal shot, was of sufficient severity to render Daugherty unconscious. Notwithstanding these facts, the Licking County Coroner ruled that the manner and mode of death was "suicide".

Defendant-appellant, in Case No. 78-A-13872 was charged with the aggravated robbery of February 17, 1980, of the Alexandria Bank. Upon defendant entering a plea of guilty to such charge, the defendant was sentenced on the aggravated robbery.

Subsequent to such conviction, the defendant was indicted for aggravated murder in that he did "purposely cause the death of Steven Daugherty while committing, attempting to commit, or fleeing immediately after committing or attempting to commit aggravated robbery." It was stipulated by the parties that the aggravated robbery referred to was the same aggravated robbery that defendant had previously been convicted of, and that it was from this robbery that he was fleeing when he did purposely cause the death of Steven Daugherty.

In the *Vitale* case, the Supreme Court found that the defendant therein was operating an automobile which struck and killed two children. The defendant was initially charged and convicted with failing to reduce speed to avoid an accident, being a violation of an Illinois statute. Following defendant's conviction on that charge, the defendant was then charged with involuntary manslaughter under Illinois law. The court found that Illinois could prosecute the traffic manslaughter if it could prove, based on conduct other than "failure to slow", since other traffic sections were available upon which the prosecution could base the traffic manslaughter. The court further said that if the state has to concede that it must prove failure to slow or to rely on conduct necessarily involving such failure, that the defendant's claim of double jeopardy was substantial as to the increase of the degree of the crime.

In applying such ruling to the case at hand, while there are other provisions upon which the conviction of aggravated murder might have been based, the indictment and the stipulation show that the State, in fact, has to rely on conduct involving the prior conviction, including

all of the elements of aggravated robbery, to be able to elevate the purposeful killing (murder) to aggravated murder. The claim of the defendant-appellant herein of double jeopardy is, therefore, substantial as to the elevation of the murder charge.

The court in *Vitale* did recognize that there is a possible exception where the court says:

> "We recognized in Brown v. Ohio, 432 US 161, 169, n 7, 53 L Ed 2d 187, 97 S Ct 2221, that [a]n exception may exist where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due dilligence. . ."

The first portion of such exception is not applicable here because the prosecution was aware of Daugherty's death at the time defendant was prosecuted for aggravated robbery.

The state urges that the second portion of the exception should be applicable because of the Coroner's initial finding of "suicide."

While the statutes require the Coroner to determine both cause and manner and mode of death, the cases in Ohio have established that the function of the Coroner is to establish only the cause of death, and any finding by the Coroner as to manner and mode of death is beyond his scope and is an improper delegation of power to such Coroner. *State ex rel Dana v. Gerber* (1946) 79 Ohio App. 1. Accordingly, any finding by the Coroner

or attempted finding as to suicide or any other manner or mode of death is improper, and cannot be relied upon by the state as a basis for not proceeding with the more serious charge initially.

In light of the foregoing, our reconsideration must arrive at the conclusion that the defendant's claim of double jeopardy was substantial, and it must be found to exist. Such a finding, however, is not completely dispositive of the case.

In the *Vitale* decision, the court indicated that the constitutional prohibition of double jeopardy has been held to consist of three separate guarantees, to-wit:

> ". . .(1) 'it protects against a second prosecution for the same offense after acquittal. [(2)] it protects against a second prosecution for the same offense after conviction, [(3)] And it protects against multiple punishments for the same offense.' North Carolina v Pearce, 395 US 711, 717, 23 L Ed 2d 656, 89 S Ct 2072 (1969). . ."

This case, as to ultimate disposition, differs substantially from *Vitale* in that in the *Vitale* case the prior charge upon which defendant was convicted related directly to the death of the victim, and without such prior acts the death could not have occurred. This is not the situation before this court in that the purposeful acts causing the death of Steven Daugherty occurred separate from and apart from the operative facts of the aggravated robbery. A similar distinction exists between the other double jeopardy cases of *Harris v. Oklahoma,* 433 U.S. 682; *Brown v. Ohio,* 432 U.S. 161; and *State v. Best,* 42 Ohio St. 2d 530.

Section 2903.01(B) Revised Code defines aggravated murder as "purposely causing the death of another while committing or attempting to commit certain felonies." Section 2903.02 Revised Code defines murder simply as: "No person shall purposely cause the death of another."

Under Ohio criminal procedure an indictment includes all lesser included offenses, and a defendant may be found guilty of an inferior degree of any charge or of a lesser included offense. See Rule 31, Ohio Rules of Criminal Procedure.

In the trial of defendant-appellant, if all the facts relating to the aggravated robbery of which he was convicted are excluded from consideration of the court and jury, the defendant was still charged with and convicted of murder in that he did purposely cause the death of Steven Daugherty on the date charged.

Applicable to such a factual situation is Rule 33(A)(4) Ohio Rules of Criminal Procedure which provides:

> "(4) That the verdict is not sustained by sufficient evidence or is contrary to law. If the evidence shows the defendant is not guilty of the degree of crime for which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict or finding accordingly, without granting or ordering a new trial, and shall pass sentence on such verdict or finding as modified;"

In view of the fact that the verdict is now contrary to law, the court can, without a new trial, pass sentence on the verdict as modified by law. *State ex rel Shearer v. Wertz,* 50 Ohio St. 2d 348 (1977).

While defendant-appellant is entitled to protection against multiple punishment for the same offense, he is not entitled to commit and walk away from a murder based on some overlap in evidence and elements when the murder is committed independent of such overlap. The action of the Supreme Court of the United States, while having the effect of modifying a sentence or a charge, is not intended to void a valid conviction. *Vargas v. Metzger,* 35 Ohio St. 2d 116.

Accordingly, for the reasons set forth herein, and pursuant to the mandate of the Supreme Court of the United States filed in this cause, the judgment of conviction of aggravated murder appealed from is modified to constitute a conviction of murder, and the sentence is reduced to an indefinite term of from fifteen years to life.

Putman, P.J., and
Rutherford, J., concur

[signatures deleted]

IN THE COURT OF APPEALS
FOR LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO,

Plaintiff-Appellee,

—vs—

JAMES MICHAEL MATHEWS,

Defendant-Appellant

JUDGMENT ENTRY

CASE NO. 2578

For the reasons stated in the memorandum-opinion on file, and pursuant to the mandate of the Supreme Court of the United States filed in this cause, the judgment of conviction of aggravated murder appealed from is, upon the authority of *Illinois v. Vitale* (1980 June 19) 65 L Ed 2d 220 and *Brown v. Ohio,* 432 U S 161, 169 n. 7, 53 L Ed 2d 187, 97 S Ct. 2221, modified to constitute a conviction of murder, and the sentence reduced to an indefinite term of from fifteen years to life.

[judge signatures deleted]

IN THE COURT OF APPEALS
FIFTH APPELLATE DISTRICT
LICKING COUNTY, OHIO

STATE OF OHIO,

Plaintiff-Appellee,

—vs—

JAMES MICHAEL MATHEWS,

Defendant-Appellant.

Case No. CA 2578

O P I N I O N

COOK, J.,

This is an appeal from a judgment of the Licking County Common Pleas Court of the conviction and sentence of appellant for the crime of aggravated murder (R.C. 2903.01).

On February 17, 1978 appellant and one Steven Daugherty robbed the Alexandria Bank at Alexandria, Ohio. They left the scene in a blue van which was followed by Chief David Allen of the St. Louisville Police Department to the residence of a family named Newhouse. After a short time, appellant came out of the house and surrendered to the police. After appellant was in custody, the police entered the farmhouse and found Steven Daugherty dead.

Appellant was later indicted for aggravated murder in that he purposely caused the death of Steven Daugherty, while committing, attempting to commit or fleeing immediately after committing or attempting to commit aggravated robbery. He was convicted on September 1, 1978 and sentenced to life imprisonment.

Appellant has appealed his conviction and sentence to this court and filed twelve assignments of error. The assigned errors are without merit.

Appellant's first assignment of error is as follows:

> "The trial court erred in overruling appellant's motion to dismiss the indictment."

In support of this assigned error, appellant argues the indictment for aggravated murder placed him in double jeopardy in violation of the 5th Amendment of the United States Constitution and Article I, Section 10 of the Ohio Constitution because he had earlier entered a plea of guilty to the offense of aggravated robbery.

The Supreme Court of Ohio, in Duvall v. State, 111 Ohio St. 657 addressed itself to this problem and, in paragraph one of its syllabus, held:

> "1. An acquittal of a defendant upon the charge of murder in the first degree, while attempting to perpetrate a robbery (under Section 12400, General Code) is not a bar to a prosecution for the crime of robbery (under Section 12432, General Code), even though committed upon the same

> person named in the former charge, and the robbery was a part of the same criminal act referred to in the indictment for murder."

Clearly a defendant may be charged with both felony murder and the underlying felony, as in the instant case.

Appellant's second assignment of error is as follows:

> "The trial court erred in refusing to allow William Howison, a polygraph expert, to testify on behalf of the defense."

As to the admissibility of the results of a polygraph test in a criminal case, the Supreme Court of Ohio, in State v. Souel, 53 Ohio St. 2d 123 held:

> "The results of a polygraphic examination are admissible in evidence in a criminal trial for purposes of corroboration or impeachment, provided that the following conditions are observed:
>
> (1) The prosecuting attorney, defendant and his counsel must sign a written stipulation providing for defendant's submission to the test and for the subsequent admission at trial of the graphs and the examiner's opinion thereon on behalf of either defendant or the state.
>
> (2) Notwithstanding the stipulation, the admissibility of the test results is subject to the discretion of the trial judge, and if

the trial judge is not convinced that the examiner is qualified or that the test was conducted under proper conditions he may refuse to accept such evidence.

(3) If the graphs and examiner's opinion are offered in evidence the opposing party shall have the right to cross-examine the examiner respecting:

(a) the examiner's qualifications and training;
(b) the conditions under which the test was administered;
(c) the limitations of and possibilities for error in the technique of polygraphic interrogation; and,
(d) at the discretion of the trial judge, any other matter deemed pertinent to the inquiry.

(4) If such evidence is admitted the trial judge should instruct the jury to the effect that the examiner's testimony does not tend to prove or disprove any element of the crime with which a defendant is charged, and that it is for the jurors to determine what weight and effect such testimony should be given."

A reading of the Souel case clearly indicates the Court contemplates the admissibility of the results of one polygraph test by the testimony of one expert witness with adequate safeguards to the opposing party.

Under such guidelines, the trial court properly refused to allow the appellant to call an expert witness of his own to attempt to discredit the testimony of the expert witness agreed upon by the parties.

Appellant's third assignment of error is as follows:

> "The trial court committed error in refusing to grant defendant's motion for acquittal made at the close of the State's case, and renewed at the close of all the evidence and in refusing to instruct the jury that suicide was the legally accepted manner and mode in which the death of Steven Daugherty occurred, and the legally accepted cause of death."

In support of this assignment of error, appellant argues that the finding that the death of Steven Daugherty was suicide, as set forth in the death certificate issued by the Licking County Coroner, was the legal cause of death and, for that reason, the trial court erred in not granting his motions for acquittal and in refusing to give a requested jury instruction to that effect.

R.C. 313.19 states:

> "The cause of death and the manner and mode in which the death occurred, as delivered by the coroner and incorporated in the coroner's verdict and in the death certificate filed with the division of vital statistics, shall be the legally accepted manner and mode in which such death occurred, and the legally accepted cause

of death, unless the court of common pleas of the county in which the death occurred, after a hearing, directs the coroner to change his decision as to such cause and manner and mode of death."

However, a death certificate, as in the instant case, is not a coroner's verdict as contemplated by R.C. 313.19 R.C. 313.19 must be read in paria materia with R.C. 313.17 which gives a county coroner the right to hold an inquest to determine the cause of death. A coroner's verdict is the result of such an inquest. No such inquest was held in the instant cause so there was no coroner's verdict.

Absent a coroner's verdict, an expression by a coroner as to the cause of death is merely an expression of his opinion, but it does not constitute the legal cause of death called for by R.C. 313.19.

Appellant's fourth, fifth, sixth, seventh and eighth assignments of error complain about the court's instructions to the jury and are as follows:

"4. The trial court committed error in refusing to instruct the jury that a coroner's verdict as to the cause of death and the manner and mode in which the death occurred is entitled to much weight.

5. The trial court erred in its failure to instruct the jury on the offense of aggravated robbery, a lesser included offense.

6. The trial court committed error in refusing to instruct the jury on the lesser included offense of voluntary manslaughter.

7. The trial court committed error in refusing to instruct the jury on the lesser included offense of involuntary manslaughter.

8. The trial court committed error in giving an instruction to the jury on the issue of "fleeing" which was submitted by the State."

As to the instruction in re the "coroner's verdict", the trial court properly refused to give the requested instruction for the reason set forth above as to the third assignment of error.

As to the failure of the trial court to instruct the jury as to the offense of aggravated robbery, the trial court did not err in refusing to so charge the jury because aggravated robbery is not an included offense of a felony murder for the reasons set forth above as to the first assignment of error.

As to the failure of the trial court to instruct the jury on voluntary and involuntary manslaughter, the trial court did not err since the evidence did not support such charges. A charge on an included offense is to be given only when the evidence supports such a charge. State v. Long, 53 Ohio St. 2d 91; State v. Nolton, 19 Ohio St. 2d 133.

As to the giving of the State's requested instruction as to the crime of robbery, the trial court did not err since the stipulation of fact entered into by the parties stated "The offense supporting the allegations of aggravated robbery in the indictment for aggravated murder

in case no. 13940, Licking County Common Pleas Court, *State v. Mathews* (contained in the original papers in the court file in the within matter) consists of this same aggravated robbery of the Alexandria Banking Company, Alexandria, Ohio, on the 17th day of February, 1978. The indictment in case no. 13940 includes allegations of fleeing from the same aggravated robbery and the proof will go to defendant's conduct during such flight."

Under such a stipulation of fact, the trial court could and did charge the jury as to what constituted the crime of robbery.

Appellant's ninth assignment of error is as follows:

> "The trial court erred in overruling appellant's motion to dismiss the indictment and to suppress all statements made by appellant before the Licking County Grand Jury."

This assigned error is without merit. Appellant waived his 5th Amendment rights before he testified before the grand jury. When asked if he had an attorney, appellant replied "Well, what I have got to say I don't need an attorney right now." (Tr 2º, pre-trial motions).

We conclude appellant made voluntary statements to the grand jury. There was no evidence that Mr. Cooper, who represented him at the time of his plea to the aggravated robbery charge, was appointed to handle any appeal from his conviction for the aggravated robbery. When told of his right to counsel and asked if he wanted one, appellant indicated he didn't need an attorney.

Appellant's tenth and eleventh assignments of error are as follows:

> "10. The trial court committed error in overruling appellant's motion to suppress the statements given by him to law enforcement authorities on May 19, 1978, and May 25, 1978.
>
> 11. The trial court committed error in overruling appellant's motion to suppress the statements given by him to law enforcement authorities on February 17, 1978, February 18, 1978, and February 19, 1978."

These assignments of error are without merit. As to the statements of May 19, 1978 and May 25, 1978, appellant was not only advised of his rights to remain silent and to have a lawyer present and signed written waivers of said rights, but the man to whom he gave the statements on May 19th, Sergeant Eisel, was requested by appellant to come to him in the Licking County jail. Clearly appellant's statements were knowingly and voluntarily made. As to the statements of February 17 and 19, 1978, the record indicates appellant was advised of the Miranda rights and waived said rights. On February 19, 1978 appellant requested Sqt. Eisel to come to talk to him. On both occasions he signed a written waiver of his rights. Each time appellant indicated to the officers he understood his right and he so testified at the suppression hearing (Pgs. 41 and 45 of Transcript of Pre-trial Motions). On page 45 of said transcript, appellant testified his statement of February 19th was voluntarily made.

Appellant contends he asked for counsel on February 17th, but this was denied by Mr. Lighttiser, the Prosecuting Attorney of Licking County, who was questioning him. The trial court found the appellant waived his rights.

Appellant's twelth assignment of error is as follows:

> "The trial court committed error in overruling appellant's motions for judgment of acquittal at the close of the State's case and at the close of all the evidence."

This assignment of error is without merit. The felony murder statute, R.C. 2903.01(B) does not contain any exceptions. The evidence clearly indicates appellant killed Daugherty to keep for himself the money taken from the bank. This was a purposeful killing during the perpetration of an aggravated robbery or fleeing from an aggravated robbery and falls within R.C. 2903.01(B).

A bank teller testified the robbery took place at approximately twenty minutes before 2 P.M. on February 17, 1978 (R. 127-128). Chief Allen, who gave chase, noted that he spotted the blue van on State Route 13 at approximately 2:20 P.M. the same day (R. 149). That is 40 minutes later. He gave immediate chase and followed the van to the Newhouse farm located in the same county. The two men exited the van, ran into the Newhouse residence and thereafter one man emerged declaring he had a hostage.

Allen testified that in the interim he thought he heard gunfire from inside the house. The entire transaction ended at 2:32 P.M. that day when appellant surrendered.

In the case of *State v. Habig (1922), 106 Ohio St. 151,* the following language appears at page 160 from which the court's charge, in the case at bar, was "lifted" verbatim. This is the portion of the charge unsuccessfully challenged in the 8th assignment of error in the case at bar. It reads:

> ". . . . . Though the crime of robbery is complete with only a slight asportation, yet, if the carrying away is in fact a long distance, the crime is still in process of commission if pursuit of the robber is immediately begun and continued without interruption until the flight has carried the perpetrator to a place of seeming security, or until uninterrupted pursuit is no longer continuously active. The mere fact of delay in beginning the pursuit until an alarm can be sounded and pursuit organized and instituted does not necessarily segregrate the flight and prevent it being part and parcel of the crime. . . . ."

The point of the 12th assignment of error is that the robbery was concluded and that also all flight had ended as a matter of law.

We disagree.

We see no reason to believe the legislative purpose was to reduce law enforcements range or to reduce the size of the umbrella of protection of persons from violence.

We see no reason to conclude that there is no legislative purpose to include fellow thieves within the laws protective ambit. After all, todays accomplice is tomorrows state's witness. The execution of a fellow criminal is a crime against the administration of justice because all such persons are potential witnesses.

Secondly, under *Habig, supra,* it is arguable that the robbery itself was not yet concluded in the case at bar. We distill from the added statutory words "or while fleeing immediately after. . ." a clear legislative purpose to lengthen the arm of the law.

Accordingly, the 12th assignment of error is overruled.

Judgment affirmed.

/s/ Robert E. Cook
ROBERT E. COOK, J.
Sitting by assignment from
the Eleventh Appellate
District

Putman, P.J. and
Dowd, J. concur.

[signatures deleted]

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
MAY 9 1985
ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NO. 84-1636

UNITED STATES OF AMERICA

Petitioner,

vs.

JAMES MICHAEL MATHEWS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MEMORANDUM FOR JAMES MICHAEL MATHEWS IN OPPOSITION

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MEMORANDUM FOR JAMES MICHAEL MATHEWS IN OPPOSITION

The factual and procedural bases underlying the State of Ohio's petition for Writ of Certiorari were set forth in its opinion by the United States Sixth Circuit Court of Appeals:

> "On February 17, 1978, Mathews and Steven Daugherty robbed a bank in Alexandria, Ohio. The police pursued Mathews and Daughtery following the robbery and surrounded them in a farm house. After a short time, Mathews surrendered, and the police entered the farm house. They found Daugherty dead, shot once in the head and once in the chest. At the time, the coroner ruled that the death was suicide.
>
> Mathews subsequently was indicted under the Ohio Rev. Code Ann. § 2911.01 on armed robbery charges. He pled guilty to these charges and was sentenced on May 17, 1978. On June 1, 1978, Mathews was indicted under Ohio Rev. Code Ann. § 2903.01 for the aggravated murder of Steven Daughtery, and on September 1, 1978, a jury found him guilty of that crime. Mathews was sentenced to life imprisonment.
>
> Mathews appealed his aggravated murder conviction, claiming that his trial for aggravated murder following his conviciton for aggravated robbery violated the double jeopardy clause. The Ohio Court of Appeals affirmed his conviction, and the Ohio Supreme Court denied Mathews' motion for leave to appeal. The United States Supreme Court, however, granted certiorari, vacated the conviction, and remanded the case for further consideration in light of Illinois v. Vitale, 447 U.S. 410 (1980). Mathews v. Ohio, 448 U.S. 904 (1980).
>
> * * *
>
> On remand, the Ohio Court of Appeals recognized that under Vitale, aggravated robbery was the same offense as aggravated murder and that Mathews' protection from double jeopardy had been violated by his second trial. Instead of vacating Mathews' aggravated murder conviction, however, the Court of Appeals modified his aggravated murder conviction to a murder conviction, which did not require a showing that the murder was in connection with a felony. Mathews' life sentence was accordingly reduced from a life sentence to fifteen years to life."

Mr. Mathews remains incarcerated at the Ohio State Penitentrary at Lucasville.

Since June 30, 1980, when the United States Supreme Court remanded this case to the Ohio Court of Appeals, all parties to the litigation have conceded that Mr. Mathews' rights under the double jeopardy clause of the Fifth Amendment to the United States Constitution, had been violated at the trial which resulted in his conviction. For almost five (5) years, and while incarcerated, Mr. Mathews has labored to obtain what this Court's remand pursuant to Vitale, supra, said he is entitled to -- i.e., a fair trial on a jeopardy permitted charge. Finally, after he had been denied that trial until February of 1985, the United States Court of Appeals for the Sixth Circuit has ordered that it should take place.

The State of Ohio argues here, as it did before the Federal Court of Appeals, that the conviction modification ordered by the Licking County (Ohio) Court of Appeals in November of 1980 was appropriate, and "cure[d]" the double jeopardy violation, making a retrial unnecessary. No argument is made here by Ohio which was not made in, and rejected by, the United States Sixth Circuit Court of Appeals.

Respondent Mathews agrees with the Sixth Circuit Court of Appeals, both for reasons set forth in that Court's opinion and for reasons not used by the court, that the action of the Ohio Court of Appeals was neither appropriate nor supported by controlling authority. He respectfully submits that the order of the Sixth Circuit Court of Appeals, that a Writ of Habeas Corpus should issue unless Mr. Mathews is retried, should stand; and he accordingly requests that the Petition for Writ of Certiorari now before this court, be denied.

It is time that the State of Ohio either grant Mr. Mathews a trial that does not violate his constitutional rights, or release him from custody.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NO. 84-1636

UNITED STATES OF AMERICA,

Petitioner,

vs.

JAMES MICHAEL MATHEWS

Respondent.

CERTIFICATE OF SERVICE

MICHAEL G. DANE, a member of the bar of this Court, certifies that pursuant to Rule 33, he served the MEMORANDUM FOR JAMES MICHAEL MATHEWS IN OPPOSITION on counsel for Petition by enclosing a copy thereof in an envelope, postage prepaid, addressed to:

Anthony J. Celebrezze
Attorney General for the State of Ohio
Attn: Richard Drake
Assistant Attorney General
30 East Broad Street, 26th Floor
Columbus, OH 43215

and depositing same in the United States Mail at Cleveland, Ohio on the 6th day of May, 1985 and further certified that all parties required to be served have been served.

MICHAEL G. DANE, Assistant
Federal Public Defender
Attorney for Respondent

JOINT

APPENDIX

Office-Supreme Court, U.S.
FILED
JUL 18 1985
ALEXANDER L. STEVAS,
CLERK

(4)

CASE NO. 84–1636

In The Supreme Court of the United States

OCTOBER TERM, 1984

R.C. MARSHALL, Superintendent
Southern Ohio Correctional Facility,
Petitioner,

v.

JAMES MICHAEL MATHEWS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED APRIL 15, 1985
CERTIORARI GRANTED JUNE 3, 1985

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Statement of James Michael Mathews
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Excerpt of Jury Instructions
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The following documents of the joint appendix have been reproduced in the appendix to the petition for writ of certiorari and are designated in the brief by reference (A-).

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Opinion, April 19, 1983, United States District Court for the Southern District of Ohio, Western Division, dismissing petition for writ of habeas corpus A-11

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RELEVANT DOCKET ENTRIES

Petition for Writ of Habeas Corpus – filed October 14, 1981 (omitted from appendix).

Opinion and Order – filed April 19, 1983, denying petition (A-11).

Notice of Appeal – filed May 10, 1983 (omitted from appendix).

Order – filed August 16, 1983, granting certificate of probable cause (omitted from appendix).

Opinion – filed February 1, 1985, reversing district court judgment. 754 F.2d 158 (A-1).

STATEMENT OF JAMES MICHAEL MATHEWS

Written statement given on February 19, 1978 at the Licking County Jail,

Exhibit 73 – Verbatim Reproduction

On the morning of Feb. 17, 1978 I located a light blue Chevrolet van owned by Daugherty Television sitting in the alley between between 4th and 5th St. with the keys in the ignition. I took the plastic signs off of the truck before I entered it. I took the van and went directly to my apartment which is located at 87 Fairfield Apt. A. I went inside and told Roberta Miller that I borrowed a van and told Steve I got the van. Steve and I had plan prior to this to steal a vehicle and rob a bank in Maringo. Steve and I then took Roberta and dropped her off at Becky Evans house on Ford St. in Johnstown. We then drove to Croton to pick Eaesel Elkins up but he was'nt home. We tried to find him but we could'nt. We then drove to Maringo and found the bank we were going to rob was closed. We left Maringo and went to Centerburg to rob the bank there but found there were to many people around. We then went to Croton and Steve wanted to rob the Croton Bank but I did'nt feel comfortable about it so we left there. We then took back roads to Alexandria. Went made one pass to see if the vault was open. We turned east at the light and went to the alley and went north we turned west in the alley next to the libary then made another left going south on SR37. We then made a left at the alley north of the bank and parked the Van headed east. Both Steve and I got out of the van, I was carrying the chrome plated revolver in my pocket and steve was carrying the blue steel revolver in his pocket and possible the shotgun. We Walked towards the bank and I started to get scared which made Steve mad. We then got back into the van

and Steve said lets do it. We then walked back towards the bank and I told Steve I could'nt do it. We went back to the alley next to the van and Steve asked me if I was going to do it or not. Steve started walking back towards the bank and I followed about 15 ft. behind. Steve entered the bank and about 5 seconds later I went in. Steve told everyone to lay on the floor. I got a red cardboard box and collected the money. I then asked where the vault was and some woman opened the one door for me. I looked inside and found no money. Steve yelled for everyone to get into the vault. Everyone entered the vault and I closed the door and turned the wheel just enough so no one could get out. We then left and took off our masks before we left the bank. We got in the van and went east out of Alexandria. We took back road to the Alex Granville Rd. A sheriff's car pasted us going the other direction, turned around and gave chase. I was driving and Steve was in the back putting the money the case. We turned on Howell Dr. and went to the Morgan Manor where we lost the cruiser. We then took back roads to SR13 turned north on SR13. Going thru St. Louisville the St. Louisville Police started to chase us then a state trooper fell in behind him. We then took a right and got on the back roads. Steve told me to pull into the farm house so I pulled the van as close to the house as possible. We both jumped out and ran up to the house. Steve gained entry to the house by putting his fist thru the window. Steve had the shotgun and I had the silver revolver. I followed Steve into the house and observed the officers thru the broken window. Steve went thru the house looking for a hostage. Steve then yelled downstairs to me that there were guns upstairs. I ran upstairs and went into the room where there were two BB and a 410 Shotgun on a rack. I took the four ten and found several 410 shells in a drawer at the bottom of the rack. Steve broke out a window by

pushing the sawed off shotgun thru it. Then we both went downstairs and observed the officers thru the broken window. I asked Steve what he did with the money and he told me it was still in the van. I told Steve I was going to go out to the van and get the money. Steve said Mike watch yourself. I took the 410 and went out to the van, got the money. On my way back to the house at approx. the porch I heard a muffled shot from inside the house. I went in and set the suitcase in the living room and yelled for Steve upstairs. I set the shotgun against the stair railing and walked about halfway up the stairs and seen Steves right foot twitching and I heard a gurgleing sound. I yelled out Steve and took one more step and saw blood on the mid section of Steves shirt. I looked up at his head and saw grey smoke burn and his face was bloody. I said Oh my God. I then turned around and took one step down the steps I heard Steve call my name in a low, labored tone. I then went to the living room, grabbed the shotgun and the suitcase with the money. I thru the suitcase between a wall and a washer then went to the kitchen and laid the shotgun shells on a counter. I went directly outside with the shotgun and held it up to indicate to the officers that I was giving myself up.

STATEMENT OF JAMES MICHAEL MATHEWS

Handwritten statement given on May 19, 1978 at the Licking County Jail,

Exhibit 78 – Verbatim Reproduction

On Feburary 17/1978 after robbing the alexandria bank me and steve daugerty ended up at the newhouse risidince after be chased by police officers from licking county. We broke a window out of the newhouse Residence and entered looking for someone in the home. After finding no one home we went up stairs and found some guns in one of the rooms. Steve took one and I think he layed it on the bed. Then I took the 410 shotgun and we both went back down stairs. At that time I ask steve were the money was and he said it was still out in the van. I tould him to cover me I was going out in the van to get the money. He said to me right before I went out to be careful and then I went out to the van, and when I was out there getting ready to come back in and I heard a muffled shot and I ran in and yelled for steve. I then heard something like a moning up stairs. I then ran up stairs and seen steve laying there on the floor. He had shot himself somewere in the head and was bleeding pretty bad. He then seen me and said mike, mike, in a moning, and I said oh fuck, he still had the gun in his hand and was trying to load it up but failed and droped it And he then said to me mike mike in a moning voice please shot me. He then pulled a yellow shell out of his green coat and he tried to hand it to me. I then was getting ready to give up and steve said again mike please shoot me. I knew he was in a lot of pain and I couldn't really shot him even though he was in pretty bad shape. But I really didn't want to, but then I said to myself real quick that if he was dead I could say that I

was kidnaped. And they couldn't prove that I robbed the bank. So I took I shell that was laying in steve hand and put it in the gun and I then I put it about an inch or two from his chest and pulled the trigger. I really don't know much after that but the gun was dropped on the floor not to far from steve body. I then run down stairs and looked for a place to hid the money. I then found a place and hide it. When I came in the house after I heard the first shot I must have put the 410 by the door, because when I gave up the gun was by the door. I picked it up and then gave up.

STATEMENT OF JAMES MICHAEL MATHEWS

Transcript of tape recorded oral statement given on May 25, 1978, at the former Ohio Penitentiary and played to the jury, Exhibit 77

This interview is taking place at the old Ohio State Penitentiary, at approximately 11:18 a.m., May 25, 1978, between Sgt. John Eisel, Licking County Sheriff's Department, and James Michael Mathews.

Sgt. Eisel: I'd like to ask you some questions Mike, we'll go through this orally and I'd like to tape the answers from you, in reference to your shooting Steven P. Daugherty. OK?

Mathews: Yes.

Sgt. Eisel: You were advised of your rights?

Mathews: Yes.

Sgt. Eisel: Did you sign a rights waiver?

Mathews: Yes.

Sgt. Eisel: Ok, first question Mike. After hearing the shot and re-entering the Newhouse residence, exactly where was Daugherty when you saw him?

Mathews: Up at the top of the stairs on the floor.

Sgt Eisel: Up at the top of the stairs on the floor?

Mathews: Yes.

Sgt. Eisel: What position was he in? Was he sitting up or standing, or flat on his back?

Mathews: He was on his back.

Sgt. Eisel: Was he completely stretched out on the floor?

Mathews: I really can't say that, I don't know exactly, he probably.....was.

Sgt. Eisel: Was his shirt soaked with blood before you shot him the second time?

Mathews: No.

Sgt. Eisel: There was no blood on his shirt .....?

Mathews: Yes there was blood on his shirt, but I think it was from his hands where he cut it, you know, when he busted through the window.

Sgt. Eisel: Ok, where was the blood located on his shirt? To the best of your knowledge, I understand that this is a couple months later.

Mathews: Around here somewhere.

Sgt. Eisel: Ok, the blood was somewhere between the neck and the wound area.

Mathews: Yes, probably some came from the shot in the beginning.

Sgt. Eisel: Ok, but the shirt did have blood on it before you shot him.

Mathews: Yes.

Sgt. Eisel: Had Daugherty bled quit a bit from the cut on his wrist before he was shot?

Mathews: Oh, yes, lots.

Sgt. Eisel: Where was the gun, the sawed off shot gun, when you came back into the Newhouse residence and saw Daugherty?

Mathews: To the best of my knowledge it was in his hand.

Sgt. Eisel: Do you recall which hand? I think you told me at the Licking County Jail that the .....

Mathews: Partially in his hand. I can't remember exactly where, but he had it. He was holding on to it with his hand.

Sgt. Eisel: Do you know which hand it was, can you visualize it?

Mathews: Un ..... I think the right hand.

Sgt. Eisel: Did he have anything in his left hand?

Mathews: I don't think so.

Sgt. Eisel: Explain exactly, what Daugherty did or said from the time you came back into the Newhouse residence and saw him?

Mathews: I just heard him moaning, and when I come up there and he seen me he just said Mike, and he wanted me to shoot him.

Sgt. Eisel: Was he .....

Mathews: Moaning? ..... Yes, he was moaning.

Sgt. Eisel: Ok, was he . . . . At this time, what position was the body in?

Mathews: He was laying . . .

Sgt. Eisel: He was laying flat on his back at that time. Was there any movement at all out of him other than just moaning?

Mathews: No, just moaning. He might have moved a little bit.

Sgt. Eisel: But he was flat on his back to the best of your knowledge with very little movement, then.

Mathews: Right.

Sgt. Eisel: Explain exactly what you did and said, from the time you entered the Newhouse residence, and the time you surrendered.

Mathews: (Silence)

Sgt. Eisel: Do you want me to repeat the question?

Mathews: Say it again .....I heard the shot outside, and come in and went upstairs, and

before I went up there I heard him moaning, you know, and calling my name and moaning. I went up there and he was laying on the floor. That's when he asked me . . . you know . . . . to shoot him, He ask me two (2) or three (3) different times. I dropped the money somewhere on the floor, then after I shot him I came on back down stair, hid the money by the dryer. I think a 20 gauge shotgun was beside the bag when I dropped it. I picked it up and surrendered.

Sgt. Eisel: You mean the 410 guage shot gun.

Mathews: Yes, the 410.

Sgt. Eisel: Did you get any of Daugherty's blood on you? If so, did you wipe it off or wash it off before you gave yourself up?

Mathews: I don't know if I got . . . . I might of had a little bit on my fingers, but I really can't say.

Sgt. Eisel: Ok, but you didn't take the time to stop and wipe your hand off or wash you hands or anything like that before you gave yourself up?

Mathews: No.

Sgt. Eisel: Mike, let's run through the whole thing again, and that's the question I'm going to ask you. Running through the whole thing you told me you went back upstairs and Steve had shot himself. Ok, you say he was

laying on his back. . . .had the shotgun in one hand and asked you to shoot him.

Mathews: Yes, he reached in his pocket and got in shot.

Sgt. Eisel: Ok.....

Mathews: Out of the green jacket.

Sgt. Eisel: Ok... was this with the right hand or .....

Mathews: The same hand.

Sgt. Eisel: The same hand that the gun was in?

Mathews: I think, the gun must have been in his right hand. I think he might have laid it on the floor . . . beside him there and got the gun. . . I mean the shell. He handed it to me.

Sgt. Eisel: Did you break the gun down to load the shell into it or did Steve break the gun down and load the shell into it?

Mathews: The gun already broke, he had it you know already broke down.

Sgt. Eisel: Ok, the gun was broke down. You took the shell and you loaded the gun.

Mathews: Yes.

Sgt. Eisel: Do you know if you held it by the brass or the plastic?

Did you notice what color the shell was.

Mathews: Yes, yellow.

Sgt. Eisel: You put a yellow colored plastic shell into it, then you put the gun back together.

Mathews: Yes.

Sgt. Eisel: Ok, now he was in a laying position, correct?

Mathews: Yes, . . . Well after I shot him .....

Sgt. Eisel: Well, prior to your shooting, he was laying there on the floor?

Mathews: Oh, yes, he was laying there.

Sgt. Eisel: Ok, you stood over him and shot him?

Mathews: More or less . . . I can't remember.

Sgt. Eisel: Well . . . can you describe it to me at all?

Mathews: Well . . . the gun was over his body.

Sgt. Eisel: Ok. You took the gun from his body.

Mathews: Yes. I shot it, you know, I shot him at an angle, you know, it wasn't straight in.

Sgt. Eisel: You shot him at an angle. How far . . . .

Mathews: It wasn't you know, it wasn't real bad, a real sharp angle, it was . . . .

Sgt. Eisel: How far did you say the gun was from his chest, when you shot him the second time?

Mathews: Two (2) or three (3) inches.

Sgt. Eisel: Ok, and you were standing almost directly over him at a slight angle.

Mathews: Right.

Sgt. Eisel: Ok, then wat happened, the minute you shot him?

Mathews: He groaned and the body twisted in some way. To the best of my knowledge, I dropped the gun close beside him.

Sgt. Eisel: Which hand were you holding the gun in when you shot him?

Mathews: Both.

Sgt. Eisel: You were holding it with both hands?

Mathews: Yes.

Sgt. Eisel: Do you remember which hand you used to pull the trigger?

Mathews: My left.

Sgt. Eisel: You used your left hand to pull the trigger and right hand, what, on the forearm?

Mathews: Right.

Sgt. Eisel: Ok, what did you do immediately after you shot him? With the gun?

Mathews: Went back down stairs.

Sgt. Eisel: Well with the 20 guage sawed off, what did you do with it?

Mathews: I dropped it.

Sgt. Eisel: You dropped it right there? Do you recall where approximately the gun dropped to?

Mathews: Close, right beside him.

Sgt. Eisel: Which side, right or left?

Mathews: His right, I think.

Sgt. Eisel: Ok, now in our interview the other day, you told me he asked you to shoot him several times in a moaning voice, is that correct?

Mathews: Yes.

Sgt. Eisel: You weren't going to shoot him at first?

Mathews: No.

Sgt. Eisel: Then you figured with him out of the way that would give the kidnapping excuse to use.

Mathews: Yes.

Sgt. Eisel: Ok, Mike, are you willing to answer these questions that I have typed out on the voluntary statement forms, in writing?

Mathews: Now?

Sgt. Eisel: Yes.

Mathews: Yeh, I guesss.

St. Eisel: That's up to you, it's voluntary. You don't have to if you don't want to. You know, it's all up to you.

Mathews: Yeh.

Sgt. Eisel: Ok, this will conclude the recorded interview at this time, being 11:20 a.m.

EXCERPT OF JURY INSTRUCTIONS

(Tr. 804–810)

Now, the defendant in this case is charged with the crime of aggravated murder. Aggravated murder is the purposeful killing of another while committing, or fleeing immediately after committing aggravated robbery. Before you can find the defendant guilty, you must find beyond a reasonable doubt . . . 1 . . . that Steven T. Daugherty was a living person and that his death was caused by the defendant in Licking County, Ohio, on or about the 17th day of February, 1978 . . . 2 . . . that the killing was done purposely . . . 3 . . . that the killing was done while the defendant was committing or fleeing immediately after committing aggravated robbery.

Now, purpose to kill is an essential element of the crime of aggravated murder.

A person acts purposely when it is his specific intention to cause a certain result . . . it must be established in this case that at the time in question, there was present in the mind of the defendant a specific intention to kill.

A person acts purposely when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature. Purpose is a decision of the mind to do an act with a conscious objective of producing a specific result, or to engage in specific conduct.

The purpose with which a person does an act is determined from the manner in which it is done, the

means or the weapon used and all the other facts and circumstances in evidence. If a wound is inflicted upon a person with a deadly weapon in a manner calculated to destroy life, the purpose to kill may be inferred from the use of the weapon.

Now, while committing aggravated robbery, means fleeing immediately after committing and means that the killing must occur as parts of acts leading up to, or occurring during, or immediately subsequent to the aggravated robbery and that the killing was directly associated with the aggravated robbery, or flight immediately after the aggravated robbery.

Now, proximate cause is an essential element of the offense of aggravated murder. Proximate cause is an act or omission which in a natural and continuous sequence directly produces death, and without which it would not have occurred. Proximate cause exists when the death is the natural and probable result of the act or omission.

There may be more than one proximate cause; however, if an act or omission of the defendant was one of the proximate causes, the existence of other causes is not a defense in this case.

Aggravated robbery is one of the elements of the crime of aggravated murder. Aggravated robbery is knowingly obtaining or attempting to obtain or fleeing after knowingly attempting to obtain property of another with a purpose of depriving the owner of such property and while having a deadly weapon on or about his person or under his control.

Before you can find the defendant guilty, you must find beyond a reasonable doubt:

1. That on or about the 17th day of February, 1978, and in Licking County, Ohio, the defendant did knowingly obtain or flee after knowingly obtaining property of some value, however small, for the purpose of permanently depriving the Alexandria Bank of such property.

2. The defendant had a deadly weapon on or about his person.

A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result, or he is aware that his conduct will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.

Knowingly means that a person is aware of the existence of the facts and that his acts will probably be of a certain nature.

Since you cannot look into the mind of another, knowledge is determined from all the facts and circumstances in evidence. You will determine from these facts and circumstances whether there existed at the time in the mind of the defendant an awareness or belief that he intended to commit a theft.

Purpose to knowingly obtain the property of another and to deprive him of such property is an essential element of the crime of aggravated robbery.

A person acts purposely when it is his specific intention to cause a certain result . . . it must be established in this case that at the time in question there was

present in the mind of the defendant a specific intention to commit the theft offense.

A person acts purposely when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.

Purpose is a decision of the mind to do an act with a conscious objective or producing a specific result. To do an act purposely is to do it intentionally and not accidentally. Purpose and intent mean the same thing. The purpose with which a person does an act is known only to himself, unless he expresses it to others or indicates it by his conduct.

The purpose with which a person does an act is determined from the manner in which it is done, the means used and all the other facts and circumstances in evidence.

A theft is knowingly stealing or obtaining property of another for the purpose of depriving that person of such property. It is not necessary that any porperty actually be taken; it is sufficient if the defendant had a purpose to steal.

A deadly weapon is any instrument, device or thing, capable of inflicting death, and designed or specially adapted for use as a weapon or possessed, carried or used as such a weapon.

Though the crime of robbery is complete with only a slight carrying away of property of another, yet, if the carrying away is in fact a long distance, the crime is

still in process of commission if pursuit of the robber is immediately begun and continued without interruption until the flight has carried the perpetrator to a place of seeming security, or until uninterrupted pursuit is no longer continuously active.

If you find that the State proved beyond a reasonable doubt all of the essential elements of aggravated murder, your verdict must be guilty of that crime and in that event you will not consider any lesser offense.

But if you find that the State failed to prove the killing was done while the defendant was committing or fleeing immediately after committing aggravated robbery, but that the killing was nonetheless purposely done, you will proceed with your deliberations and decide whether the State has proved beyond a reasonable doubt the elements of the lesser crime or murder.

The crime of murder is distinguished from aggravated murder by the State's failure to prove that the killing was done while the defendant was committing or fleeing immediately after committing the crime of aggravated robbery.

To constitute murder as a lesser included offense of aggravated murder, it must be established that Steven Daugherty was a living person and that his death was caused by the defendant in Licking County, Ohio, on or about the 17th day of February, 1978, and that there was a purpose to kill Steven Daugherty, existing in the mind of the defendant at the time of the act. And you will keep in mind the definition of purpose previously given to you by the Court.

If you find that the State proved beyond a reasonable doubt all of the essential elements of the crime of the lesser crime of murder, your verdict must be guilty of murder.

However, if you find that the State has failed to prove beyond a reasonable doubt any one of the essential elements of the crime of murder, you must find the defendant not guilty.

CERTIFICATE OF SERVICE

I hereby certify that the requite number of copies of the foregoing Joint Appendix have been served on respondent, James Michael Mathews, by forwarding such copies through the office of his counsel, Michael G. Dane, Assistant Public Defender, 1301 Superior Avenue, Room 210, Cleveland, Ohio 44114, by United States Mail, postpaid, this _____ day of July, 1985. I further certify that all parties required to be served have been so served. Respondent's address is the Southern Ohio Correctional Facility at Lucasville, Ohio.

RICHARD DAVID DRAKE
Assistant Attorney General

PETITIONER'S

BRIEF

FILED
JUL 18 1985
ALEXANDER L. STEVAS,
CLERK

(3)

CASE NO. 84–1636

In The Supreme Court of the United States

OCTOBER TERM, 1984

R.C. MARSHALL, Superintendent
Southern Ohio Correctional Facility,
Petitioner,

v.

JAMES MICHAEL MATHEWS,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

WHETHER, AND UNDER WHAT CIRCUMSTANCES, A VIOLATION OF THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT MAY BE REMEDIED BY MODIFYING A JEOPARDY-BARRED CONVICTION TO THAT OF A LESSER AND INCLUDED OFFENSE WHICH IS NOT JEOPARDY-BARRED.

PARTIES

The petitioner in this action is R.C. Marshall in his capacity as Superintendent of the Southern Ohio Correctional Facility at Lucasville, Ohio. The respondent is James Michael Mathews.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is reported as *Mathews v. Marshall,* 754 F.2d 158 (6th Cir. 1985). (A-1)[1]. The decision of the United States District Court for the Southern District of Ohio, Western Division, is unreported. (A-11). The decision of the Ohio Court of Appeals for the Fifth Judicial District, upon remand from this Court's order in *Mathews v. Ohio,* 448 U.S. 904 (1980), is unreported. (A-21). The initial decision of the Ohio Court of Appeals for the Fifth Judicial District is also unreported. (A-29).

JURISDICTION

The opinion of the United States Court of Appeals was entered on February 1, 1985. The petition for writ of certiorari was filed on April 15, 1985. Certiorari was granted by order of June 3, 1985. Jurisdiction is conferred pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The case involves Section 1 of Amendment XIV to the Constitution of the United States:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

and Amendment V to the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

This case also involves Ohio Revised Code Section 2903.01 which provides in pertinent part:

> (B) No person shall purposely cause the death of another . . . while fleeing immediately after committing . . . aggravated robbery.

[1] References to the appendix to the petition for writ of certiorari are herein designated as (A-). Referençes to the joint appendix are designated as (JA-).

> (C) Whoever violates this section is guilty of aggravated murder . . .

and Ohio Revised Code Section 2903.02 which provides in pertinent part:

> (A) No person shall purposely cause the death of another.
>
> (B) Whoever violates this section is guilty of murder . . .

and Ohio Revised Code Section 2911.01 which provides in pertinent part:

> (A) No person, in attempting or committing a theft offense . . . shall . . .
>
> (1) Have a deadly weapon . . . on or about his person or under his control.
>
> (B) Whoever violates this section is guilty of aggravated robbery . . .

CASE NO. 84–1636

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

R.C. MARSHALL, Superintendent
Southern Ohio Correctional Facility,
Petitioner,

v.

JAMES MICHAEL MATHEWS,
Respondent.

STATEMENT OF THE CASE

The instant case comes before this Court upon the petition of the State of Ohio to review the decision of the United States Court of Appeals for the Sixth Circuit in *Mathews v. Marshall,* 754 F.2d 158 (6th Cir. 1985). Therein, a 2-1 majority of the circuit court reversed the judgment of the United States District Court for the Southern District of Ohio and ordered that respondent be released from custody unless retried for the crime of the murder.

The facts which gave rise to respondent's state court conviction are vital to the resolution of the instant controversy. The events will thus be chronicled in some detail.

It is undisputed that at 1:40 p.m. on February 17, 1978, respondent James Michael Mathews and one

Steven Daugherty robbed at gunpoint a federally insured bank located in Alexandria, Ohio. Upon exiting the bank, respondent and Daugherty were seen entering a distinctively marked van. A civilian witness became suspicious and gave law enforcement officials a complete description of the van and its license number. A police radio dispatch was broadcast to all mobile units and, within minutes, a police cruiser spotted the vehicle. A high speed chase immediately ensued and at 2:21 p.m. the pursuing officer reported the chase.[2] Three (3) minutes later [2:24 p.m.] the pursuing officer radioed that the van had left the highway and that two suspects had exited the vehicle and entered a farmhouse. An all points bulletin was broadcast and, within moments law enforcement officers from a variety of jurisdictions began converging upon and surrounding the farmhouse. Four (4) minutes thereafter [2:28 p.m.], the initial pursuing officer radioed that one of the suspects had exited the farmhouse and announced that they had hostages. The suspect then went to the van and returned to the farmhouse. The officer heard shots fired in the farmhouse. Four (4) minutes later [2:32] p.m.], the officer radioed that a single suspect who later proved to be the respondent herein was exiting the farmhouse with his hands in the air. The entire sequence of events, from initial pursuit to surrender, thus lasted some eleven (11) minutes. Law enforcement officers entered the farmhouse and found Steven Daugherty dead.[3] The cause of

[2] This and other precise times were verified by audio tape recordings which were automically made of all police radio transmissions.

[3] While the elapsed time between initial chase and ultimate apprehension was only eleven (11) minutes, the bank robbery itself was remote as to both the time and place as Daugherty died almost exactly one hour subsequent to the robbery and miles from its place of commission.

Daugherty's death will be discussed hereinafter. The officers also found the stolen bank money hidden in the house.

Respondent was taken into custody and, an hour later, made the first of a series of custodial statements. This statement was made to the prosecuting attorney. After waiving his rights, respondent was placed under oath and tendered a three (3) hour statement which was transcribed by a court reporter. The essence of this statement was that Daugherty and another individual identified only as "Cliff" had forced respondent to aid in the bank robbery by threatening to kill both respondent and his girlfriend. Respondent claimed that "Cliff" had jumped out of the van during the high speed chase. Respondent denied shooting Daugherty.

Shortly after completion of the first statement, agents of the Federal Bureau of Investigation arrived. Respondent gave a second statement to the F.B.I. agents. Therein, respondent conceded that "Cliff" was a fictional entity and admitted that it was he and Daugherty who had planned and executed the bank robbery. Respondent, however, denied shooting Daugherty.

Two (2) days after the bank robbery, respondent tendered a third statement in which he again confessed to the armed robbery.[4] Respondent stated that he and Daugherty stopped at the farmhouse in order to take hostages but that no one was home. Respondent stated that he went to the van and obtained the $15,866 in stolen money. Respondent also stated that he heard a single gunshot and, upon investigation, saw that

[4] This statement was written and is reproduced in its entirety in the joint appendix (JA-2).

Daugherty had shot himself in the head. Respondent claimed that Daugherty was conscious and able to call him by name. Respondent stated that he hid the bank money, surrendered to the police, and then concocted the story concerning his being held at gunpoint by Daugherty and "Cliff" in order to avoid prosecution. Respondent denied shooting Daugherty.

One week after the bank robbery [February 24, 1978], the County Coroner issued a death certificate declaring Daugherty's death to be a "suicide". The certificate listed the cause of death as a 40 gauge rifle shot to the head and a 38 caliber pistol shot to the chest. This death certificate was wholly erroneous as both wounds were inflicted from the same 20 gauge sawed off shotgun. The coroner later conceded that he issued the death certificate *prior* to receiving the results of the autopsy conducted by a forensic pathologist. It was not, however, until August 18, 1978, that the coroner issued a supplemental death certificate.

Given that the cause of death was listed as a "suicide", only the bank robbery charge was persued. Respondent was indicted for the crime of aggravated robbery in violation of Ohio Revised Code Section 2911.01 in that he did in " . . . committing a theft offense . . . have a deadly weapon . . . on or about his person or under his control". On May 17, 1978, respondent entered a plea of guilty and was sentenced to a term of imprisonment.

Two (2) days after his guilty plea [May 19, 1978], respondent, while in the county jail awaiting conveyance to the Ohio Penitentiary, asked to speak with the investigating officer. The officer arrived and took a tape

recorded statement from respondent. Therein, respondent for the first time admitted that he shot Daugherty. Respondent stated that Daugherty had shot himself in the head but admitted that Daugherty was alive when he fired a second shot gun blast into Daugherty's chest. Respondent also gave a handwritten statement[5] wherein he wrote in pertinent part:

> At that time I ask steve were the money was and he said it was still out in the van. I tould him to cover me I was going out in the van to get the money. He said to me right before I went out to be careful and then I went out to the van, and when I was out there getting ready to come back in and I heard a muffled shot and I ran in and yelled for steve. I then heard something like a moning up stairs. I then ran up stairs and seen steve laying there on the floor. He had shot himself somewere in the head and was bleeding pretty bad. He then seen me and said mike, mike, in a moning, and I said oh fuck, he still had the gun in his hand and was trying to load it up but failed and droped it And he then said to me mike mike in a moning voice please shot me. He then pulled a yellow shell out of his green coat and he tried to hand it to me. I then was getting ready to give up and steve said again mike please shoot me. I knew he was in a lot of pain and I couldn't really shot him even

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[5] A verbatim reproduction of respondent's handwritten statement is included in the joint appendix. (JA-5).

though he was in pretty bad shape. But I really didn't want to, *but then I said to myself real quick that if he was dead I could say that I was kidnaped. And they couldn't prove that I robbed the bank.* So I took I shell that was laying in steve hand and put it in the gun and I then I put in about an inch to two from his chest and pulled the trigger. (JA-5). (emphasis added.)

On May 25, 1978, respondent, while incarcerated in the Ohio Penitentiary, made a second tape recorded statement wherein he admitted killing Daugherty.[6] Both this and the May 19, 1978 tape recording were played to the jury during respondent's subsequent trial. During the May 25, 1978 tape recorded interview, respondent stated in pertinent part:

Sgt. Eisel: Ok, now in our interview the other day, you told me he asked you to shoot him several times in a moaning voice, is that correct?

Mathews: Yes.

Sgt. Eisel: You weren't going to shoot him at first?

Mathews: No.

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[6] A transcript of the May 25, 1978 tape recorded statement is included in the joint appendix. (JA-7).

Sgt. Eisel: Then you figured with him out of the way that would give the kidnapping excuse to use.

Mathews: Yes.

On May 31, 1978, respondent agreed to testify before the Licking County, Ohio, Grand Jury and was returned from prison for this purpose. Before the Grand Jury, respondent recounted in detail the bank robbery and other events leading up to the death of Steven Daugherty. Respondent admitted that he was the only person in the farmhouse with Daugherty and that it would have been physically impossible for Daugherty to have fired the second, fatal shotgun blast. Respondent, however, recanted his earlier taped recorded confessions and denied shooting Daugherty.

The Grand Jury returned an indictment charging respondent with aggravated murder in violation of Ohio Revised Code Section 2903.01(B) in that he did ". . . purposely cause the death of another [Steven Daugherty] while . . . fleeing immediately after committing . . . aggravated robbery." As noted by the Ohio Court of Appeals, it was stipulated that the aggravated robbery referred to in the indictment was the same aggravated robbery to which respondent had earlier been convicted, i.e., the armed robbery of the Alexandria Bank. (A-23). Respondent's pretrial motion to dismiss the aggravated murder indictment as violative of the Double Jeopardy Clause of the Fifth Amendment was denied by the state trial court.

At trial,[7] the prosecution presented the testimony of the forensic pathologist who had conducted the autopsy of Steven Daugherty. The pathologist testified that Daugherty had sustained two (2) wounds from a single shot 20 gauge sawed off shotgun.[8] The forensic evidence revealed that the initial shot was fired while Daugherty was standing and entered the left side of his face. The shotgun pellets then vertically proceeded to lodge in the ceiling.[9] None of the pellets penetrated the skull or entered the brain but the mere force of the blast would have rendered Daugherty immediately unconscious. This wound was not fatal. The second shotgun round was fired directly into his heart. This shot was instantaneously fatal. The uncontroverted physical evidence demonstrated that it was medically impossible for Daugherty to have fired the second, fatal shotgun blast. As aptly stated by the Ohio Court of Appeals:

> Steven Daugherty had been shot twice with a shotgun, the first shot being to the side of the head, and the second shot being in the chest. Medical testimony indicated that the shot to the head was the first shot, and, while not the fatal shot, was of sufficient severity to render Daugherty unconscious. Notwithstanding these facts, the Licking County Coroner ruled that the manner and mode of death was "suicide". (A-22).

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[7] Respondent initially entered a plea of not guilty by reason of insanity but withdrew such plea immediately prior to the commencement of the trial. [Tr.5]

[8] The weapon in issue was "single shot" insofar as it would only hold one shell at a given time. Once fired, the shotgun would have to be "broken down" and another shell would have to be manually loaded in order to make the weapon again operable.

[9] This shot was consistent with that of a self-inflicted wound.

Prior to trial, the prosecution and defense entered into a stipulation that respondent would take a polygraph examination and that the results of such test would be admissible at trial. See *State v. Souel,* 53 Ohio St. 2d 123, 372 N.E. 2d 1318 (1978). The polygraph operator testified that the results indicated that respondent was being deceptive when he denied shooting Daugherty.

While it was not incumbent upon the prosecution to establish a motive for the murder, the theory of the State's case was that respondent murdered Daugherty in order to silence him and thus prevent him from contradicting respondent's initial story to the effect that Daugherty had kidnapped respondent and forced him to aid in the bank robbery. If respondent had succeeded in convincing the authorities that he had been compelled to participate in the bank robbery, he would have both avoided prosecution and, perhaps, later recovered the money which he had hidden in the farmhouse. This theory of the homicide motive was entirely consistent with the physical and testimonial evidence adduced at trial.

The theory of the defense was somewhat convoluted.[10] During opening statement, the defense admitted that respondent committed the bank robbery in concert with Daugherty.[11] The defense, however, argued that respondent had not shot Daugherty. The defense conceded that respondent had given multiple confessions to the murder but argued that such statements were false and had only been made in order that

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[10] Respondent did not testify at trial.

[11] The trial judge precluded either the prosecution or the defense from informing the jury of respondent's earlier guilty plea to the bank robbery, i.e., the prosecution gained no advantage from such plea.

that respondent could remain in the county jail rather than being transferred to a state prison. The rationale for this argument was that respondent had supposedly formed an intention to escape and that such escape would be more easily facilitated from the less secure county jail. The defense, of course, could not explain away the indisputable physical evidence which demonstrated that it was physically impossible for Daugherty to have fired the second, fatal shotgun blast.

At the conclusion of the evidence, the trial judge instructed the jury as to the elements of the offense of aggravated murder.[12] The trial judge went on to instruct the jury as to the lesser and included offense of murder by stating as follows:

> If you find that the State proved beyond a reasonable doubt all of the essential elements of aggravated murder, your verdict must be guilty of that crime and in that event you will not consider any lesser offense.
>
> But if you find that the State failed to prove the killing was done while the defendant was committing or fleeing immediately after committing aggravated robbery, but that the killing was nonetheless purposely done, you will proceed with your deliberations and decide whether the State has proved beyond a reasonable doubt the elements of the lesser crime of murder.

[12] The relevant jury instructions are included in the joint appendix. (JA-17).

> *The crime of murder is distinguished from aggravated murder by the State's failure to prove that the killing was done while the defendant was committing or fleeing immediately after committing the crime of aggravated robbery.*
>
> To constitute murder as a lesser included offense of aggravated murder, it must be established that Steven Daugherty was a living person and that his death was caused by the defendant in Licking County, Ohio, on or about the 17th day of February, 1978, and that there was a purpose to kill Steven Daugherty, existing in the mind of the defendant at the time of the act. And you will keep in mind the definition of purpose previously given to you by the Court.
>
> If you find that the State proved beyond a reasonable doubt all of the essential elements of the crime of the lesser crime of murder, your verdict must be guilty of murder.
>
> However, if you find that the State has failed to prove beyond a reasonable doubt any one of the essential elements of the crime of murder, you must find the defendant not guilty. (JA-21). (emphasis added.)

Respondent perfected an appeal as of right to the Ohio Court of Appeals for the Fifth Judicial District. The appellate court issued an opinion affirming respondent's conviction. (A-29). The Supreme Court of Ohio

declined to grant discretionary review. This Court, however, granted respondent's petition for writ of certiorari and remanded the case for further consideration in light of *Illinois v. Vitale,* 447 U.S. 410 (1980). *Mathews v. Ohio,* 448 U.S. 904 (1980).

Upon remand, the Ohio Court of Appeals issued a second decision finding respondent's aggravated murder conviction to be violative of the Double Jeopardy principles enunciated in *Illinois v. Vitale, supra.* (A-21). The appellate court held as follows:

> In applying such ruling to the case at hand, while there are other provisions upon which the conviction of aggravated murder might have been based, the indictment and the stipulation show that the State, in fact, had to rely on conduct involving the prior conviction, including all of the elements of aggravated robbery, to be able to elevate the purposeful killing (murder) to aggravated murder. The claim of the defendant-appellant herein of double jeopardy is, therefore, substantial as to the elevation of the murder charge.
>
> * * *
>
> In light of the foregoing, our reconsideration must arrive at the conclusion that the defendant's claim of double jeopardy was substantial, and it must be found to exist. Such a finding, however, is not completely dispositive of the case.
>
> * * *

> This case, as to ultimate disposition, differs substantially from *Vitale* in that in the *Vitale* case the prior charge upon which defendant was convicted related directly to the death of the victim, and without such prior acts the death could not have occurred. This is not the situation before this court in that purposeful acts causing the death of Steven Daugherty occurred separate from and apart from the operative facts of the aggravated robbery. A similar distinction exists between the other double jeopardy cases of *Harris v. Oklahoma,* 433 U.S. 682; *Brown v. Ohio,* 432 U.S. 161.
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> * * *
>
> Section 2903.01(B) Revised Code defines aggravated murder as "purposely causing the death of another while committing or attempting to commit certain felonies." Section 2903.02 Revised Code defines murder simply as: "No person shall purposely cause the death of another."
>
> Under Ohio criminal procedure an indictment includes all lesser included offenses, and a defendant may be found guilty of an inferior degree of any charge or of a lesser included offense. See Rule 31, Ohio Rules of Criminal Procedure.
>
> In the trial of defendant-appellant, if all the facts relating to the aggravated robbery of which he was convicted are

excluded from consideration of the court and jury, the defendant was still charged with and convicted of murder in that he did purposely cause the death of Steven Daugherty on the date charged.

* * *

While defendant-appellant is entitled to protection against multiple punishment for the same offense, he is not entitled to commit and walk away from a murder based on some overlap in evidence and elements when the murder is committed independent of such overlap.

* * *

> Accordingly, for the reasons set forth herein, and pursuant to the mandate of the Supreme Court of the United States filed in this cause, the judgment of conviction of aggravated murder appealed from is modified to constitute a conviction of murder, and the sentence is reduced to an indefinite term of from fifteen years to life.

The appellate court thus modified respondent's conviction to one of having "purposefully caused the death of another" in violation of Ohio Revised Code Section 2903.02 and reduced respondent's sentence accordingly. The Supreme Court of Ohio again denied respondent's motion for discretionary review. This Court denied respondent's ensuing petition for writ of certiorari.

Respondent thereafter filed a petition for writ of habeas corpus pursuant to 28 U.S.C. Section 2254 with the United States District Court for the Southern District of Ohio, Western Division. Therein, respondent contended that the modification of his conviction and sentence by the Ohio Court of Appeals was inadequate to remedy the Double Jeopardy violation. On April 29, 1982, the district court issued an opinion dismissing respondent's habeas corpus petition as without merit. (A-11). The district court reasoned as follows:

> Thus, the Ohio court would have the right to retry the defendant on a charge of murder without this being a violation of the Double Jeopardy Clause due to the former overturned conviction of aggravated murder.
>
> The Court here, however, did not do this. Instead it merely reduced the aggravated murder conviction to a murder conviction. In order to achieve this, the Ohio appellate court simply separated the element of robbery from the other two elements of intent and the act, thereby removing the taint of the double jeopardy violation. Since the trial judge clearly instructed upon each element of aggravated murder and as an alternate of murder, it is clear that the jury had to make specific findings on each step of the process. That is, the jury had to conclude that the petitioner killed Daugherty, the petitioner intended to kill Daugherty, and the petitioner was fleeing from committing

the robbery at the time of the murder. By removing the third finding, the jury still would have found that the petitioner killed Daugherty, and that he intended to do so. Thus, without the aggravated robbery, the jury would still have found the petitioner guilty of murder.

Since the result of a new trial would be the same as a reduction of the charge of murder, the reduction merely saves the State and the petitioner the burden and cost of another trial. Therefore, as an alternative to a retrial of the petitioner, the Ohio appellate court had the power to reduce the conviction to the lesser included offense of murder in order to purge the taint of the constitutional violation. (A-18, A-19).

Respondent filed a notice of appeal and was granted a certificate of probable cause. Subsequent to briefing and argument, the United States Court of Appeals for the Sixth Circuit issued a 2–1 decision reversing the district court judgment and ordering that respondent be released unless the State of Ohio retried him for the crime of murder.[13] *Mathews v. Marshall,* 754 F. 2d 158 (6th Cir. 1985). (A-1). The majority acknowledged that a clear split of authority existed among the federal circuit courts. 754 F. 2d at 160-161. The majority rejected the Fifth Circuit analysis articulated in *Tapp v. Lucas,* 658 F. 2d 383 (5th Cir. 1981), *cert denied,* 456 U.S. 972 (1982)

[13] As one of the stated purposes of the Double Jeopardy Clause is to *prevent* multiple prosecutions, it is anomalous that a second trial has been mandated in order to cure a perceived violation of that Fifth Amendment provision.

and, instead, embraced the Second Circuit rationale stated in *Graham v. Smith,* 602 F.2d 1078 (2nd Cir. 1979), *cert. denied,* 444 U.S. 995 (1979). Specifically, the majority stated that:

> We therefore agree with the Second Circuit that a conviction obtained in violation of the double jeopardy clause cannot be modified if the defendant can show that there was a "reasonable possibility that he was prejudiced" by the double jeopardy violation. *Graham,* 602 F.2d at 1083. "[A]n exceedingly small showing . . . would suffice" to demonstrate such a possibility of prejudice. Id. 754 F.2d at 162. (A-8).

The majority held that evidence regarding the bank robbery that was admitted during respondent's state court aggravated murder, i.e., murder while fleeing from an armed robbery, would be inadmissible in a prosecution for "simple" murder.

In his dissent, Judge Brown correctly demonstrated the fallacy of the majority reasoning by stating:

> The reason there is a possibility that Mathews was so prejudiced, the majority opinion holds, is that "evidence was admitted in his trial for aggravated murder that would not have been admissible in a trial for murder."
>
> It will be remembered that Mathews and one Daugherty had robbed a bank and, while pursued by police, were surrounded

> in a farm house. Shortly, two shots were fired and Daugherty was found dead, shot in the head and chest.
>
> If is far from clear to me that, under the ordinary rules of evidence, the State would not, in a murder trial, have been allowed to prove the surrounding circumstances, including the facts surrounding the just-completed bank robbery. 754 F.2d at 162. (A-9, A-10).

Judge Brown went on to emphasize that the question before a federal court reviewing a state court conviction is whether the inmate was deprived of a right secured by the United States Constitution. Judge Brown noted that the majority was vacating a presumptively valid state court conviction for what was, at most, mere trial court error of nonconstitutional proportions regarding the admission of evidence. Judge Brown stated the fundamental significance of such error as follows:

> More importantly, admission of such proof would not rise to a federal constitutional violation, and we are here dealing with the question whether, by reducing Mathews' conviction to murder, he has been deprived of a federal constitutional right. I do not think so and therefore dissent. 754 F. 2d at 162. (A-10).

The petition for writ of certiorari filed on behalf of the State of Ohio was granted by order dated June 3, 1985.

SUMMARY OF ARGUMENT

A jeopardy-barred greater offense may be modified to a lesser and included offense which is not jeopardy-barred unless the defendant alleges and demonstrates either bad faith on the part of the prosecution in bringing the greater charge or can demonstrate actual prejudice as a result of having had to defend the greater charge. In the second instance, the relevant inquiry is analogous to the test utilized to examine a claim of misjoinder of offenses. In the context of a state court conviction, the issue is whether evidence admitted during the trial on the jeopardy-barred offense, which would not have been admissible in a trial on the lesser and included offense, so tainted the proceeding so as to have denied the accused a fundamentally fair trial.

ARGUMENT

This case involves the Double Jeopardy Clause of the Fifth Amendment as made applicable to the States through incorporation by the Fourteenth Amendment. The question presented is whether a violation of the Double Jeopardy Clause may be remedied by modifying a jeopardy-barred conviction to that of a lesser and included offense which is not jeopardy-barred. A resolution of the issue requires an initial examination of both the constitutional provision itself and the pertinent state statutory mechanism.

The Double Jeopardy Clause states that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." While seemingly simple, this Court has had occasion to comment that "the decisional

law in the area is a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator." *Albernaz v. United States,* 450 U.S. 333, 343 (1981). Much of the controversy, like that in the instant case, has centered upon whether separate statutory crimes are the "same offense" for purposes of the Double Jeopardy Clause. Differing standards of review have evolved dependent upon whether the claimed violation involves multiple prosecutions or multiple punishments. The genesis of the difficulty in the instant case was confusion regarding these differing determinations of what constitutes the "same offense" as that term is intended for double jeopardy analysis.

The tripartite guarantees afforded by the Double Jeopardy Clause were identified in *North Carolina v. Pearce,* 395 U.S. 711 (1969) as follows:

> That guarantee has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the offense. 395 U.S. at 717 (footnotes omitted).

This case concerns the second of the above stated protections, i.e., a second prosecution subsequent to an earlier conviction.

The Ohio statutory scheme does not easily lend itself to double jeopardy analysis. Under Ohio law, the crime of murder is defined exclusively by Ohio Revised Code Section 2903.02 which provides simply that "no

person shall purposely cause the death of another."[14] While there exist lesser degrees of homicide, the murder statute defines the most serious crime relating to offenses against persons. The Ohio legislature, however, chose to provide for enhanced *punishment* in situations wherein an individual does "purposely cause the death of another" and such murder was committed "while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape." Ohio Revised Code Section 2903.01(B).[15] The Ohio legislative body thus determined that a murder committed under such circumstances poses a greater risk to society and should, accordingly, carry a higher sanction.[16]

Ohio's "aggravated murder" statute is thus in reality an enhancement provision mandating increased punishment where a purposeful killing is committed in conjunction with a specified felony.[17] However, the purposeful killing must always be independently proven beyond a reasonable doubt and the predicate felony can in nowise be utilized to prove such intent.[18]

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[14] The penalty for the violation of this code provision is statutorily fixed at a term of from fifteen (15) years to life imprisonment.

[15] The Ohio legislature has also provided for enhanced punishment where an individual does "purposely cause the death of another" and does so "with prior calculation and design," i.e., premeditated murder. See, Ohio Revised Code Section 2903.01(A).

[16] The penalty for violation of Ohio Revised Code Section 2903.01 is statutorily fixed at life imprisonment or, under circumstances not herein present, death.

[17] To this end, the Ohio statute may be likened to recidvist statutes which this Court has held to pass double jeopardy scrutiny. See, e.g., *Cryger v. Burke,* 334 U.S. 728, 732 (1948).

[18] Ohio thereby rejects the common law crime of felony murder embraced by other jurisdictions. See, e.g., *Harris v. Oklahoma,* 433 U.S. 682 (1977).

It has long been the law in Ohio that "the offense of murder in attempting to perpetrate a robbery and the offense of robbery are separate and distinct offenses . . . they are not the same offense . . . the plea of former jeopardy . . . does not apply." *Duvall v. State,* 111 Ohio St. 657, 669, 146 N.E. 90, 93 (1924). Indeed, it was upon the basis of the *Duvall* decision that the Ohio Court of Appeals initially rejected respondent's double jeopardy claim. (A-30). The Ohio appellate court properly held that while murder is a lesser and included offense of aggravated murder, "aggravated robbery is *not* an included offense." (A-35) (emphasis added). In the instant case, the jury was properly instructed that:

> [I]f you find that the State has failed to prove beyond a reasonable doubt any one of the essential elements of the crime of murder, you must find the defendant not guilty. (JA-22).

The jurors were thus instructed that if the prosecution failed to prove that respondent did "purposefully cause the death of Steven Daugherty," it was incumbent upon them to return a general verdict of acquittal.

The initial relevant inquiry is whether, upon conviction for both aggravated murder and an independently charged predicate felony, cumulative punishment would be permissible. For, "[i]f two offenses are the same under this test for purposes of barring consecutive sentences at a single trial, they necessarily will be the same for barring successive prosecutions." *Brown v. Ohio,* 432 U.S. 161, 166 (1977). In *Brown,* this Court stated the pertinent test as follows:

The established test for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment was stated in Blockburger v. United States, 284 U.S. 299, 304, 76 L Ed 306, 52 S Ct 180 (1932):

> "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. . ."

> This test emphasizes the elements of the two crimes. "If each requires proof of a fact that the other does not, the Blockburger test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes . . ." Iannelli v. United States, 420 US 770, 785 n 17, 43 L Ed 2d 616, 95 S Ct. 1284 (1975). 432 U.S. at 166.

Were the test fashioned in *Blockburger v. United States,* 284 U.S. 299 (1932) and reiterated in *Brown v. Ohio, supra,* still the prevailing standard in the cumulative punishment context, respondent could not have been sentenced to consecutive sentences for both aggravated murder and aggravated robbery even if the offenses were tried in a unitary proceeding, i.e., as charged herein the

offense of aggravated robbery does not require proof of a fact which aggravated murder does not. The seemingly rigid language found in *Brown* has not, however, remained unaltered.

Drawing upon language from the decision in *Whalen v. United States,* 445 U.S. 684 (1980), this Court in *Albernaz v. United States,* 450 U.S. 333 (1981) stated:

> The Blockburger test is a "rule of statutory construction," and because it serves as a means of discerning congressional purpose the rule should not be controlling where, for example, there is a clear indication of contrary legislative intent. 450 U.S. at 340.

Albernaz, in turn, formed the foundation of the decision in *Missouri v. Hunter,* 459 U.S. 359 (1983) wherein seven members of the Court agreed that:

> With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does not more than prevent the sentencing court from prescribing greater punishment than the legislature intended.
>
> * * *
>
> Where, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the "same" conduct under Blockburger, a court's task

> of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial. 459 U.S. at 366, 368-369.

In dissent, Justice Marshall and Justice Stevens stated:

> Had respondent been tried for these two crimes in separate trials, he would plainly have been subjected to multiple prosecutions for "the same offence" in violation of the Double Jeopardy Clause.
>
> * * *
>
> . . .the phrase "the same offence" should not be interpreted to mean one thing for purposes of the prohibition against multiple prosecutions and something else for purposes of the prohibition against multiple punishment.
>
> * * *
>
> If the prohibition against being "twice put in jeopardy" for "the same offence" is to provide meaningful protection, the phrase "the same offence" must have content independent of state law in both contexts. 459 U.S. at 369, 374.

The Ohio courts have uniformly held that the Ohio General Assembly intended that a criminal defendant may, in a single criminal proceeding, be sentenced to

consecutive sentences upon conviction for the crimes of aggravated murder and the underlying predicate felony. See, e.g., *State v. Moss,* 69 Ohio St. 2d 515, 433 N.E. 2d 181 (1982), *cert. denied,* 459 U.S. 1200 (1983); *State v. Bickerstaff,* 10 Ohio St. 3d 62, 461 N.E. 2d 892 (1984); *State v. Royster,* 3 Ohio App. 3d 442, 446 N.E. 2d 190 (1982). Thus, had the prosecution in the instant case been initially possessed of sufficient knowledge, the Grand Jury could have returned a multi-count indictment charging respondent with both aggravated murder, i.e., murder while fleeing immediately after committing aggravated robbery, and a substantive count of aggravated robbery. Under this scenario, respondent could have been convicted of both offenses and been sentenced to consecutive sentences.

The dilemma in the instant case, and undoubtedly the reason why this dispute is before this Court on yet a third occasion, is that at the time of respondent's arrest, the prosecution was *not* possessed of sufficient information so as to reasonably seek an indictment charging respondent with the death of Steven Daugherty. This want of reasonable cause was occasioned by both respondent's initially false statements and the Coroner's wholly inexplicible assessment of the cause of death.[19] At the time of respondent's arrest, the State could thereby

[19] Upon remand from this Court's order in *Mathews v. Ohio,* 448 U.S. 904 (1980), the Ohio Appellant court held that the faulty Coroner's report did not qualify as an exception under the State's failure to proceed with the greater offense despite "due diligence" as articulated in *Brown v. Ohio,* 432 U.S. at 169 n. 7. (A-24). Without analysis or discussion, the lower federal court found this determination to be "persuasive." (A-19).

either proceed on the bank robbery charge or release respondent. These existing circumstances amounted to the proverbial Hobson's choice, i.e., no choice at all. Respondent was thus charged only with the bank robbery and, with due dispatch, he entered a plea of guilty.

As previously outlined, subsequent revelations, most notably respondent's series of confessions, demonstrated beyond peradventure that respondent had, in fact, purposefully caused the death of Steven Daugherty. The Grand Jury elected to return an indictment for "aggravated" rather than "simple" murder. Respondent was tried and found guilty as charged.

Upon direct appeal respondent argued that, as charged and proved, the earlier aggravated robbery conviction was a lesser included offense of the subsequent aggravated murder conviction and, accordingly, the decision in *Brown v. Ohio, supra* was controlling and the latter conviction must be thereby vacated. Given that, by reference to *state law,* respondent's lesser included offense argument was without foundation, the Ohio appellate court initially rejected such argument pursuant to the long standing precedent set in *Duvall v. State, supra.* (A-31). As the third prong of the three protections ensured by the Double Jeopardy Clause is defined in terms of a state's statutory intent, this conclusion was not altogether unreasoned.

This Court, however, later drew a distinct dichotomy between what the term "same offense" as stated within the confines of the Double Jeopardy Clause means in relation to the prohibition against cumulative punishment imposed in a single proceeding and the meaning of that phrase in relation to a multiple prosecution setting.

In *Illinois v. Vitale,* 447 U.S. 410 (1980), this Court seemingly dispelled any doubts as to the literal language contained in *Brown v. Ohio, supra,* insofar as the *Blockburger* test being a *constitutional standard* which controls independent of state law in a multiple prosecution setting. The Court defined a lesser included offense as "an offense consisting solely of one or more of the elements of the crime for which [the defendant] has already been convicted" and further stated that "a conviction on [such] a lesser-included offense bars subsequent trial on the greater offense." 447 U.S. at 421. That the *Blockburger* standard was being "constitutionalized" in multiple prosecution circumstances was further reinforced when the Court made reference to "a species of lesser-included offense." 447 U.S. at 420.

Upon remand from this Court's decision in *Vitale,* the Ohio Court of Appeals faithfully and literally accepted the language therein and held that respondent's earlier guilty plea to aggravated robbery was the "same offense," for purposes of the Double Jeopardy Clause, as the underlying predicate felony which elevated respondent's conviction from murder to aggravated murder. (A-24).

With only minor derivations, e.g., *Jeffers v. United States,* 432 U.S. 137 (1977) (defendant occasioned multiple prosecutions by opposing motion to consolidate charges); *Ohio v. Johnson,* _____U.S._____, 81 L. Ed. 2d 425 (1984) (defendant occasioned multiple prosecutions by pleading guilty, over prosecution objection, to only some of the charges contained in a multi-count indictment), the Court has until most recently continued to embrace the literal application of the *Blockburger* test in all multiple prosecution cases. However, on the very

day that certiorari was granted in the instant case, this Court issued the decision in *Garrett v. United States,* 471 U.S. _____, 85 L. Ed. 2d 746 (June 3, 1985). Concurring in *Garrett,* Justice O'Connor aptly stated that its "conclusion is admittedly in tension with certain language in prior opinions of the Court. E.g., *Brown v. Ohio.*" In light of the majority opinion in *Garrett,* there is much to be said for the proposition that the Double Jeopardy Clause of the Fifth Amendment was *not* offended by the circumstances which obtained in the instant case. It is, however, equally valid that such a proposition is not subsumed within the question presented herein. Absent a contrary directive from this Court, petitioner will therefore continue, albeit reluctantly, to presuppose that respondent's aggravated murder conviction violated the Double Jeopardy Clause.

The question in the instant case is thus the adequacy of the remedy utilized by the Ohio appellate court. Rather than reversing respondent's aggravated murder conviction and remanding for a new trial on the charge of "simple" murder, the appellate court vacated the aggravated murder conviction and modified the conviction and attendant statutory sentence to that of the lesser and included offense of murder. Given the unique Ohio statutory scheme, and in light of the evidence adduced at respondent's trial, this remedial action constituted a common sense resolution which was in full accord with respondent's rights under both the Double Jeopardy and the Due Process Clauses of the Constitution.

The question of the appropriate remedy for a double jeopardy violation analogous to that herein has twice been before this Court.

In *Price v. Georgia,* 398 U.S. 323 (1970), the petitioner had been initially charged with murder but convicted of the lesser and included offense of voluntary manslaughter. On appeal, petitioner's conviction was reversed on state law grounds. Rather than retrying the petitioner for the crime of voluntary manslaughter, Georgia elected to disregard the "implied acquittal" and proceeded on the greater murder offense. The petitioner was, however, again convicted of only the lesser and included offense of voluntary manslaughter. This Court, citing the decision in *United States ex rel. Hetenyi v. Wilkins,* 348 F.2d 844 (2nd Cir. 1965), *cert. denied,* 383 U.S. 913 (1966) (Marshall, J.), rejected the State's harmless error argument by reasoning:

> Further, and perhaps of more importance, we cannot determine whether or not the murder charge against petitioner induced the jury to find him guilty of the less serious offense of voluntary manslaughter rather than to continue to debate his innocence. 398 U.S. at 331.

The Court thus established a rule requiring a new trial in circumstances where the jeopardy-barred greater offense might have occasioned a compromise verdict on the lesser and included offense. As the respondent herein was convicted of the greater offense, no compromise concerns exist.

In *Benton v. Maryland,* 395 U.S. 784 (1969), the Court addressed the issue of the remedy for a double jeopardy violation in a context similar to that in the instant case. The petitioner therein was initially charged with both burglary and larceny but, upon initial trial,

was found guilty of burglary and not guilty of larceny. Upon appeal, the petitioner's conviction was reversed on state law grounds. Maryland again charged petitioner with burglary and larceny and in the second trial he was convicted of both offenses. Holding for the first time that the Double Jeopardy Clause was applicable to the States through incorporation by the Fourteenth Amendment, this Court reversed the larceny conviction. The petitioner, however, further argued that his burglary conviction should also be reversed because "some evidence, inadmissible under state law in a trial for burglary alone, was introduced in the joint trial for both burglary and larceny, and that the jury was prejudiced by this evidence." 395 U.S. at 797. The petitioner thus made the precise "spillover" prejudice argument advanced by the herein respondent and embraced by the court below. Noting that it was "not obvious on the face of the record that the burglary conviction was affected by the double jeopardy violation," this Court remanded to the state judiciary for examination of the issue in light of Maryland law and that State's evidentiary principles. 395 U.S. at 798. Such alternative is, of course, impossible in this case as it comes before this Court upon collateral habeas corpus review by the federal judiciary rather than direct review from the Ohio courts. The *Benton* resolution is, however, instructive as it clearly rejects any rule of automatic reversal in cases such as this.

Given that there exists no requirement of automatic reversal, the next logical inquiry is what standard of review should prevail where litigants complain of "spillover" prejudice arising from evidence which was admitted to prove a jeopardy-barred conviction. This question was definitively answered in *United States v. Losada,*

674 F.2d 167 (2nd Cir. 1982), *cert. denied,* 457 U.S. 1125 (1982) wherein the Court stated "[a] ppellants can only succeed in this argument if they show bad faith on the part of the [prosecution] in bringing the [jeopardy-barred] charge, or if they show prejudice." 674 F. 2d at 170. This disjunctive test accomodates both double jeopardy and due process values and should be adopted by this Court.

The initial prong of the test meets concerns under the Double Jeopardy Clause. The prohibition against a second prosecution for the "same offense" after an earlier conviction has its rationale in promoting finality by preventing oppressive overreach by the prosecution. *Garrett v. United States,* 471 U.S. _____, 85 L. Ed. 2d at 782-784 (O'Connor J., concurring). The bringing of a jeopardy-barred charge in bad faith is precisely the type of prosecutorial conduct precluded by the second protection afforded under the Double Jeopardy Clause. Such tactics are intolerable under the Clause and the prosecution should in no manner profit from such conduct. Thus, reversal of derivative convictions is warranted even absent a demonstration of prejudice. Compare, *Price v. Georgia, supra.*

Where, however, there is no allegation of bad faith, those values protecting against prosecutorial oppression through repeated prosecution are wholly lacking. In such circumstances, double jeopardy concerns in a multiple prosecution setting are greatly dissipated. To this end, the analysis is more closely akin to a case presenting a misjoinder of offenses and should be reviewed as such. The complaining litigant should thus be required to both allege and demonstrate actual prejudice as a result of

having to defend the jeopardy-barred offense. If there exists no actual prejudice to the defendant, reversal of untainted convictions obtained in the same proceeding serves no useful end and, indeed, undermines precepts of finality by causing yet another prosecution and defense. *Tapp v. Lucas,* 658 F. 2d 383, 386 (5th Cir. 1981), *cert. denied,* 456 U.S. 972 (1982). In the context of reviewing a state court conviction that standard compelled by the Due Process Clause should be utilized, i.e., whether the accused was denied a fundamentally fair trial.

In the instant case, respondent does not so much as allege prosecutorial bad faith. Indeed, given the then unsettled state of double jeopardy jurisprudence, such an assertion under the facts of this case would be specious. The State garnered nothing by respondent's earlier guilty plea, i.e., there was no "dry run" trial, and such guilty plea has in hindsight resulted in a windfall reduction in the length of respondent's sentence.

More importantly, any claim of actual prejudice is, under any reasoned assessment of the evidence adduced at respondent's trial, untenable. It must be remembered that the murder of Steven Daugherty did not occur in a vacuum. By respondent's *own account,* he murdered Daugherty in order to concoct his initial kidnapping story. Respondent's motive in murdering Daugherty was to silence him and avoid prosecution for the bank robbery and, hopefully, to thereafter return and obtain the stolen money which he had hidden. (JA-5). Rule 404 of the Ohio Rules of Evidence provides in pertinent part:

> (B) Other crimes, wrongs or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The murder of Daugherty cannot under either logic or evidentiary principles be separated from the earlier bank robbery. Simply stated, Daugherty's death was a direct consequence of the robbery, i.e., without the robbery and ensuing events respondent would have had neither the opportunity nor the motive to have murdered Daugherty. It is inconceivable that in a prosecution for "simple" murder the fact of the bank robbery and circumstances occurring immediately thereafter would not have been revealed.

The majority of the court below found that respondent's rights under the Double Jeopardy Clause had been violated when he was prosecuted a second time for the "same offense." The remedy mandated by the majority is that respondent be prosecuted a third time. It is difficult to rationalize such relief as being commensurate with, rather than compounding, the perceived violation. Under the facts of this case, the Constitution does not demand yet a third trial for both the prosecution and the defense.

CONCLUSION

For all of the aforementioned reasons, the judgment of the court below should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the required number of copies of the foregoing Brief for Petitioner have been served on respondent, James Michael Mathews, by forwarding such copies through the office of his counsel, Michael G. Dane, Assistant Public Defender, 1301 Superior Avenue, Room 210, Cleveland, Ohio 44114, by United States Mail, postpaid, this _____ day of July, 1985. I further certify that all parties required to be served have been so served. Respondent's address is the Southern Ohio Correctional Facility at Lucasville, Ohio.

RICHARD DAVID DRAKE
Assistant Attorney General

RESPONDENT'S

BRIEF

Supreme Court, U.S.
FILED
AUG 15 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1636

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

T. L. MORRIS, Superintendent
Southern Ohio Correctional Facility,
Petitioner,

v.

JAMES MICHAEL MATHEWS,
Respondent.

On Writ Of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

The events of February 17, 1978 which served as the basis upon which criminal charges were subsequently brought against James Mathews, and the pretrial, trial and appellate proceedings which followed, are described in the Brief for Petitioner. That description will be supplemented here only to the extent necessary to correct inaccuracies or omissions which are material to consideration of the questions presented by this appeal.[1] Inasmuch as those questions may involve prediction of the outcome of a jeopardy permitted trial, factors relevant to that consideration are noted at length.

A

> "On February 17, 1978, Mathews and Steven Daugherty robbed a bank in Alexandria, Ohio. The police pursued Mathews and Daugherty following the robbery and surrounded them in a farmhouse. After a short time, Mathews surrendered, and the police entered the farmhouse. They found Daugherty dead, shot once in the head and once in the chest. At the time, the coroner ruled that the death was suicide." *Mathews* v. *Marshall*, 754 F.2d 158 (6th Cir. 1985); at page 159.[2]

The farmhouse entered by Mathews and Daugherty was unoccupied at the time of their arrival. Entrance was

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[1] Rules of the Supreme Court of the United States; Rule 34.1(g); 34.2.

[2] Prior to his death, Daugherty had been incarcerated (R. 119) and at the time of his death was on bond (R. 118) for a criminal charge. (R. 119) He had stated that he would not be taken back to prison, because going back would kill him. (R. 119)

The conclusion that the victim was dead when found by the police (Brief for Petitioner at page 5) is based, of course, upon their trial testimony. Before the grand jury, respondent testified that upon surrendering, he had left the victim alive. In earlier statements (JA. 5, 10) Mathews said that the victim, suffering a severe head wound, had begged to be shot. (R. 623).

A key potential trial witness, who was one of the first law enforcement officers to enter the Newhouse residence immediately after Mr. Mathews' surrender there on February 17, 1978, could not be located by the parties to be subpoenaed for trial. (R. 471; 485; 609).

gained when Daugherty broke a window, to reach inside and unlock a door. In the process, he suffered a severe laceration[3] to his wrist which resulted in profuse bleeding. Both of his hands,[4]the shotgun he carried, and the unejected shell later found in it,[5] were covered with blood. After less than ten minutes in the farmhouse, respondent surrendered to the police with the statement that his partner had blown his head off.[6]

Though immediately handcuffed after his surrender, there was no evidence that the respondent had any blood on his hands at the time of surrender.[7] Sinks, bathtubs and wash basins within the house were examined with the result that there was no indication that they had recently been used to wash away blood.[8] No gunshot residue tests were run on either the respondent or the victim.[9]

Two custodial statements made by respondent in which he admitted killing the victim were inconsistent with the trial testimony of the pathologist who conducted the autopsy, and with known physical evidence, in at least three significant respects. The pathologist testified that the muzzle of the shotgun was held tightly against the

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[3] R. 309.

[4] R. 513.

[5] R. 510.

[6] R. 158; 570.

[7] R. 157-58; 592.

[8] R. 625.

[9] R. 514-516. The reason given for this at trial was:

"Q: Is there any reason that you did not [sic] a parafine or nitrate test on Mr. Mathews' hands?

"A: Yes sir. Because it was quite late by the time we did return to the office, approximately 8:30 p.m., and once you urinate, a nitrate test is no longer any good as I understand it."

"Q: Did you ask Mr. Mathews if he had gone to the bathroom in the mean time?

"A: No sir, he was still being interviewed.?"

(R. 521).

victim's chest at the time the shot was fired, as indicated by a resulting "wad of blackened fat,"[10] discharged from the body. In Mathews' "confessions" to the killing, he describes holding the muzzle "about an inch or two from his chest"[11] and "two or three inches" from the chest,[12] distances which would have produced, not the wad of fat, but fouling and stippling, "outside the limits of the wound itself."[13] According to the pathologist, the wound to the victim's head was immediately incapacitating but not fatal, rendering the victim unconscious,[14] while according to the "confessions" the victim both spoke and engaged in volitional movement (reached into his pocket; "broke down" the shotgun) subsequent to the head wound.[15] In his "confession" Mathews denied having wiped or washed blood off of his hands before surrendering (consistent both with examination of a wash basin, bathroom sink and bathtub, and with the short period of time spent in the farmhouse), yet the shotgun used and the chambered shell were covered with blood.

The Licking County Coroner tentatively ruled the death a suicide on the basis of observations made at the scene on February 17, 1978. The autopsy report of the Cincinnati pathologist was completed by March 9, 1978. After receipt of that report, a supplemental death certificate was issued by the same Licking County Coroner, in which, once again, the cause of death was ruled a suicide. At some point prior to the trial, the coroner's office was contacted by the Licking County Prosecutor's Office and told to delete suicide on the death certificate.[16]

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[10] R. 374.

[11] JA 6; Statement of May 19.

[12] JA 14; Statement of May 25.

[13] R. 374.

[14] R. 392; 406.

[15] JA 5, 12.

[16] R. 329.

B

Respondent made a series of six statements to law enforcement officers, county prosecutors, or the grand jury, prior to trial. The first three of these statements were made on February 17, 1978 (2), and on February 19, 1978. Through these three statements, respondent admitted participation in the bank robbery (after an initial false exculpatory statement) but denied having shot the victim.

On February 22, 1978, respondent was charged in a three count indictment with the Alexandria bank robbery, with theft of a van used in the robbery, and with burglary. *After*[17] this indictment was returned, the Licking County Coroner filed a Death Certificate (February 24, 1978) ruling that the cause of Daugherty's death had been suicide.

On May 17, 1978, respondent pled guilty to the three counts set forth in the February 22 indictment. One of these counts was that charging the aggravated robbery of the Alexandria bank on February 17, 1978. On the same day that these pleas were entered (May 17th), respondent was sentenced on all three counts.

On May 19, 1978 respondent made the first of two statements in which he said that he had shot the victim. While giving this statement, respondent both admitted and denied that the statement he was giving was, in fact, true.[18] This statement of May 19, 1978, was, in significant respects, inconsistent with physical evidence then known to the prosecutor, *supra*.

On May 21, 1978, there was an attempt to escape from the Licking County Jail. The attempt was made on the first floor of the jail where respondent was incarcerated.[19]

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[17] See: Brief for Petitioner, p. 7.

[18] R. 625.

[19] R. 711.

Earlier, an escape from the first floor of that jail had been successful.[20] On the 21st, at an area to which respondent had access, a clasp holding the lock had been sawed in half, and several bars had been cut.[21]

Between May 21st and May 25th, 197[illegible], respondent was moved from the Licking County Jail to the more secure Medical Facility (formerly the Ohio State Penitentiary) at Columbus. There, on May 25, 1978, he was interviewed again and confirmed his statement of May 19th. During this interview, he was asked to answer eight (8) specific typewritten questions with written answers. He did so, but the answers he gave still left discrepancies between respondent's statements and the events of February 17th as revealed by known physical evidence.

On May 31, 1978 respondent testified before the Licking County Grand Jury under questioning by the Licking County Prosecutor, Mr. David Lighttiser. Apparently proceeding under the assumption that respondent understood the nature of the body before which he was testifying,[22] Mr. Lighttiser gave no initial explanation of the function of a grand jury. Mathews testified[23] that he and

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[20] *Id.*

[21] R. 714.

[22] "Q: Mike, you know why we are here today?

"A: I guess.

Mr. Lighttiser did then advise respondent of his *Miranda* rights.

[23] Apparently without an understanding, at least initially, of the forum:

"A: On the front porch, I was just getting ready to go back into the house at that point . . . can I ask you a question?

"Q: Go ahead.

"A: Who are all these people?

"Q: They are the grand jury.

"A: That means that all of the people that are getting indicted this month, they indict the people?

"Q: Yes, the grand jury indicts, you understand that?

"A: Yes.

"Q: Like when you were indicted for the other crimes, it was not this

Daugherty robbed the bank, and fled to the farmhouse, where Daugherty shot himself. Mathews denied having shot Daugherty, said that Daugherty was alive when he (Mathews) surrendered, said that he believed that a police officer had shot Daugherty the second time, and refused to give a detailed explanation for what he said had been his earlier false confessions.

On June 1, 1978, an indictment was filed which charged that the respondent did

> "Purposefully cause the death of Steven Daugherty, while committing, attempting to commit, or fleeing immediately after committing or attemption to commit Aggravated Robbery."

It is undisputed that the aggravated robbery charge in this felony murder indictment of June 1, 1978 is the same aggravated robbery for which respondent had been indicted on February 22, 1978, and upon which he was sentenced to incarceration for a period of seven (7) to twenty-five (25) years after he had entered his guilty plea of May 17, 1978. That conviction and sentence have remained undisturbed by appeal or collateral attack.

C

Trial of the aggravated murder charge commenced in the Licking County Common Pleas Court on August 22, 1978 with argument on a defense Motion to Dismiss the Indictment on Double Jeopardy grounds, based upon *Blockburger* v. *United States*, 284 U.S. 299 (1932), *Brown* v. *Ohio*, 432 U.S. 161 (1977), *Ashe* v. *Swenson*, 397 U.S. 436 (1970), and *State* v. *Cooper*, 13 N.J. 361 (1833). The defense argued that the case relied upon by the State of

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grand jury but a different one, these people were not the ones that handed down that indictment, O.K.?

"A: Yes.

"Q: Okay, so when you heard what you thought was a shot . . ."

Ohio, *Duvall* v. *State*, 110 Ohio St. 657 (1924), had not survived the United States Supreme Court holdings in *Blockburger, supra* and *Brown*,[24] *supra*.

The State of Ohio argued that the felony murder prosecution at bar constituted the prosecution of a criminal act which was separate and distinct from the aggravated robbery to which Mr. Mathews had entered a guilty plea on May 17, 1978. Accordingly, it argued that the prosecution was permissible under the *Blockburger* "elements" test,[25] under the *Brown* v. *Ohio* exception to successive prosecutions,[26] under the continuing applicability of *Duvall* v. *State*,[27] *supra*, and because

> "The robbery part of it is really not an element of the crime but only a condition which increases the penalty and increases a penalty from a plain murder to aggravated murder."[28]

The Motion to Dismiss was denied without findings of fact or any explanation of the court's reasoning.[29]

D

On August 23, 1978, jury selection commenced. During *voir dire* examination, conducted *en masse*, nine potential

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[24] R. 4-15.

[25] R. 17.

[26] *Id.*

[27] R. 18. On direct appeal, the Licking County Court of Appeals adopted this argument. Contrary to petitioner's suggestion (Brief of Petitioner, page 30), respondent suggests that this conclusion *was* "altogether unreasoned," in that (a) the issue was discussed by the court, not in multiple punishment, but in second prosecution terms; and (b) that court's attention had been directed to *Brown* v. *Ohio*, 432 U.S. 161 (1977) by the parties, yet *Brown* was not so much as mentioned in the decision.

[28] R. 18-19. See: Note 60, *infra*.

[29] See: Note 59, *infra*. After the State had rested at trial, the defense argued a Motion for Judgment of Acquittal. It took the position, in light of the court's earlier denial of the Double Jeopardy claim, that the robbery and homicide were *separate* offenses and thus not properly chargeable under the felony-murder statute. This motion was also denied. (R. 693-694)

jurors[30] admitted having heard or read about the case. Of these, four jurors[31] recalled having heard about *two* bank robberies having been committed in close temporal proximity to one another, and one juror described speculating that the same person may have robbed both banks. Of these four jurors, one (Moody) was excused by the defense during exhaustion of available peremptory challenges; two (Cramer and Runyon) sat on the jury which convicted Mr. Mathews; and the fourth (Myers) served as an alternate on that jury.

During the course of the trial, the Licking County Prosecutor was called to testify as a witness on behalf of the State. He was asked to relate the substance of Mr. Mathews' grand jury statement of May 31, 1978. Having received permission from the court to proceed, he then gave an initially unresponsive answer:

> "Q: Will you relate to the jury the substance of Mr. Mathews' statements on May 31st?
>
> "A: Am I permitted to reveal that information pursuant to Rule 6-E?
>
> "THE COURT: The Court has ruled on the record pursuant to Rule 6-E that you may proceed without objection.
>
> "A: Yes, Mr. Mathews when he was interviewed at the time of the Grand Jury—this would have been after the disposition of the pending charges that had been lodged against him. There were two counts of aggravated robbery and auto theft and burglary and this would have been after all those cases had been disposed of—he related the information . . .".[32]

[30] R. 59-85.

[31] Cramer, Moody, Runyon, and Myers; R. 60, 63, 66, and 85.

[32] R. 630. See: Note 85; *infra*.

In addition to making this disclosure that Mr. Mathews had been charged with "two counts of aggravated robbery and auto theft and burglary", the prosecutor had testified earlier in the trial. Then, he had narrated the false exculpatory statement which had been given by the respondent on February 17, 1978, immediately after his surrender.

Also introduced during the State's case in chief at trial was evidence (a) that respondent had obtained a sawed-off shotgun to be used in the bank robbery; (b) that respondent had stolen a van to be used for the robbery; (c) that respondent and Daugherty had "shopped" in various communities for an appropriate bank to rob; (d) that ski masks were worn during the robbery of the Alexandria bank; (e) that the bank tellers were physically and verbally abused during the course of the robbery; (f) that bank employees were locked in the vault; (g) that a high speed police chase ensued after the robbery; (h) that respondent and Daugherty intended to take a hostage at the farmhouse; and (i) that respondent pretended to have taken a hostage, in order to keep the police at bay.[33] Such evidence was apparently considered relevant and admissible with regard to the jeopardy barred aggravated robbery element of the offense.

Before the defense rested, the court granted a prosecution Motion In Limine, that defense witnesses not mention a polygraph examination of the defendant which had been conducted prior to the one administered by the Ohio State Patrol Officer, the results of the latter having been admitted by stipulation.[34] The court further prohibited the calling of a defense polygraph expert for the purpose

[33] R. 128; 130; 150; 426; 427; 428.

[34] R. 695.

of rendering an opinion as to the results of the test admitted.

SUMMARY OF ARGUMENT

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution is unique among the constitutional protections afforded an accused, in that, where applicable, it entirely prohibits trial. The prohibition is against second prosecutions after conviction or acquittal of the "same offense," and against multiple punishments for the "same offense."

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *United States* v. *Green*, 355 U.S. 184 (1957).

Accordingly, this Court has never squarely held that violation of the right may be subjected to a harmless error test, but, to the contrary, has repeatedly suggested such an analysis would be prohibited by virtue of the nature of the protected interests:

> *Price* v. *Georgia*, 398 U.S. 323 (1970):
>
> ". . . Georgia submits that the second jeopardy was harmless error when judged by the criteria of *Chapman* v. *California*, 386 U.S. 18 (1967), and *Harrington* v. *California*, 395 U.S. 250 (1969).
>
> We must reject this contention. The Double Jeopardy Clause, as we have noted, is cast in terms of the risk or hazard of trial and conviction, not of the ultimate legal consequences of the verdict." at page 331.

> *Jeffers* v. *United States*, 432 U.S. 137 (1977):
>
> "Any adjustment in punishment for the fact that the defendant already has been punished for the lesser offense is not adequate to cure the injury suffered because of multiple prosecutions, since the double jeopardy problem inheres in the very fact of a second trial for the "same" offense. See *Blackledge* v. *Perry*, 417 U.S. 21, 30-31 (1974); *Price* v. *Georgia*, 398 U.S. 323, 329 (1970)." at page 151, Note 18.
>
> *Burks* v. *United States*, 437 U.S. 1 (1978):
>
> ". . . where the Double Jeopardy Clause is applicable, its sweep is absolute. There are no "equities" to be balanced, for the Clause had declared a constitutional policy, based on grounds which are not open to judicial examination." at page 11, Note 6.

Petitioner here seeks application of a harmless error test to what was admittedly a Double Jeopardy violation.

After James Mathews was convicted of aggravated murder, at a trial, the conducting of which was prohibited in its entirety by the Double Jeopardy Clause, this Court reversed and remanded to an Ohio Court of Appeals in recognition of that violation. Rather than ordering further remand to dismiss the indictment, that court "modified" the judgment of conviction to constitute murder rather than aggravated murder, and resentenced accordingly.

The appropriateness of this modification can only be analyzed through application of some form of a harmless error test, comparing the modified result to the presumed result of a permitted trial. Such a test, however, is not applicable to a Double Jeopardy violation, because it is the trial itself, and not the conviction, which the clause prohibits. Modification of the result of the trial does not "cure" the prejudice to the accused, which lies not in the result but in having been taken to trial. By virtue of the unique nature of the Clause, application of a harmless

error test is therefore inappropriate, and, accordingly, modification should be prohibited.

"Nice" questions (See: *ex parte Lange*, 85 U.S. 163 (1873)) have been asked for more than a century concerning application of the protection, and have recently been asked in increasingly complex situations. But the heart of the Double Jeopardy Clause has always been considered its prohibition against a second prosecution after conviction of the "same offense." Accordingly, if increasingly complex questions are to result in the conclusion that some interests protected by the clause are so insignificant as to permit a harmless error analysis, even then, successive or "second prosecution" type violations should remain immune.

> "When a defendant has been once convicted and punished for a particular crime, principles of fairness and finality require that he not be subjected to the possibility of further punishment by being again tried or sentenced for the same offense. *Ex parte Lange*, 18 Wall. 163 (1874); *In re Neilsen*, 131 U.S. 176 (1889)." *United States* v. *Wilson*, 420 U.S. 332 (1975); at p. 343.

Because the instant case is a "successive prosecution" type violation, as opposed, for example, to an implied acquittal, mistrial, or multiple punishment violation, modification is inappropriate, if not by virtue of the nature of the clause, then by virtue of the nature of the violation. The interest in prohibiting prosecutorial overreaching and the inability to predict the outcome of a jeopardy permitted trial in "second prosecution" violations, compel this conclusion.

Finally, should the traditional harmless error analysis be held applicable to even "second prosecution" type Double Jeopardy violations, application of that test to the instant case supports the finding of the United States Court of Appeals for the Sixth Circuit that the forcing of

respondent to trial on jeopardy barred charge was prejudicial. Accordingly, the decision of that Court that the Petition for Writ of Habeas Corpus be granted in this case, should be affirmed.

ARGUMENT

I. Modification Of A Resulting Conviction As A 'Cure' To A Double Jeopardy[35] Violation, Necessarily Requires Application Of Some Form Of A Harmless Error Test To The Process Through Which The Conviction Was Obtained.

A

The suggestion that, in light of the conviction *as modified*, James Mathews has not been prejudiced by the violation[36] of his right to be free from successive prosecutions for the same offense, necessarily requires consideration of whether the result of a trial on a jeopardy permitted charge would have been no more favorable to him than the conviction and sentence *as now modified*. In order to conclude that the result of a jeopardy permitted

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[35] ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . .".

[36] Notwithstanding a suggestion to the contrary in petitioner's brief (See: Brief of Petitioner, at page 32), the question of *whether* respondent's Double Jeopardy rights were violated is a dead issue, long before now resolved in favor of the respondent, as conceded by the petitioner (a) in the Sixth Circuit (". . . the state concedes that Mathew's trial for aggravated murder violated the double jeopardy clause.", *Mathews* v. *Marshall*, 754 F.2d 158 (6th Cir. 1985) at page 160; (b) in petitioner's Petition for Writ of Certiorari (See: Petition for Writ of Certiorari at page 19); and (c) by the petitioner in its statement of the Question Presented to this Court. Respondent agrees that "such a proposition is not subsumed within the question presented herein." (Brief of Petitioner, page 32).

In conceding the violation of respondent's double jeopardy right, petitioner also necessarily concedes that the exception to the prohibition of successive prosecutions noted in *Brown* v. *Ohio*, 432 U.S. 161 (1977); at page 169, Note 7; is inapplicable here. See: Brief for Petitioner, at p. 29, Note 19.

trial would not have been more favorable, it is necessary to agree either:

(a) that those factors which resulted in the barred trial verdict (the evidence adduced, the arguments made, the instructions of law given, the manner in which the trial was conducted, etc.) would necessarily have remained unchanged at a permitted trial; or

(b) that any differences in these or other factors which might have influenced the jury, which differences may have occurred at a jeopardy permitted trial, would necessarily have resulted in a verdict no more favorable to respondent than that reached here, *as modified*.

To request of this Court that it consider and rule upon the correctness of these positions—such review entailing, as it must in order to be meaningful,[37] a complete consideration of not only what took place at the barred trial,[38] but what may have happened differently at a permitted trial[39]—amounts, initially (i.e., before reaching the question of whether the error was prejudicial in a particular case) to a request that the Court sanction, generally, the process of application of some form of a harmless errortest

[37] *United States ex. rel. Hetenyi* v. *Wilkins*, 348 F.2d 844 (2nd Cir. 1965).

[38] "The energies and resources consumed by such injuiry [sic: inquiry] would be staggering and the attainable level of certainty most unsatisfactory. There could never be any certainty as to whether the jury was actually influenced by the unconstitutionally broad scope of the reprosecution or whether the accused's defense strategy was impaired by this scope of the charge, even if there were a most sensitive examination of the entire trial record and a more suspect and controversial inquest of the jurors still alive and available." *Hetenyi*, *supra*, at page 864.

[39] See: *Benton* v. *Maryland*, 395 U.S. 784 (1969); *Price* v. *Georgia*, 398 U.S. 323 (1970).

to a Double Jeopardy violation.[40]

[40] Petitioner does not identify his request as being that of application of a harmless error test to a Double Jeopardy violation, but suggests that this Court adopt the reasoning of *United States* v. *Losada*, 674 F.2d 167 (2nd Cir. 1982), and apply an "actual prejudice" test, arguing that rather than double jeopardy, ". . . the analysis is more closely akin to a case presenting a misjoinder of offenses and should be reviewed as such." (Brief of Petitioner, at page 35.)

The test suggested by petitioner would put the burden on the party whose rights were violated, to show that the violation was not "prejudicial"—i.e., harmful. Petitioner does not specify the standard to be used in meeting this burden, although adoption of the reasoning of *Losada*, *supra*, (Brief of Petitioner at page 34, 35) and the argument that ". . . the relevant inquiry is analagous to the test utilized to examine a claim of misjoinder of offenses.", (Brief of Petitioner at page 22), suggests that petitioner would require the victim of the violation to carry a "heavy burden of persuasion." *Losada*, *supra*, at page 171.

Losada sets forth the language that petitioner suggests should be adopted here, at page 170 of that opinion. The language did not originate with *Losada*, but was taken from language in *United States* v. *Variano*, 550 F.2d 1330 (2nd Cir. 1977), at page 1334.

Losada was a case in which the claim of prejudice was made based upon evidence introduced (a) as to a different offense tried at the same trial, and (b) as to a different person, tried at the same trial. The case is thus clearly distinguishable from the instant case where a single person is being charged with the same offense at a second prosecution. The test used in *Losada* had been used in *Variano only as to the joinder issue there presented*. This is evident from *Variano's* citation, in support of its own use of the test, of *United States* v. *Aiken*, 373 F.2d 294 (2nd Cir. 1967).

A reading of *Aiken*, *supra*, shows that the genesis of this language and test took place in a joinder context, where double jeopardy was neither argued nor mentioned by the Second Circuit Court of Appeals. Immediately following the *Aiken* citation, *Variano* cites four other cases. In the texts of these four opinions, the words 'double jeopardy' never appear. They are misjoinder cases, addressing matters of judicial discretion rather than constitutional right.

The test suggested by petitioner is taken from a long line (1963-1982) of misjoinder decisions, and is entirely inappropriate here, where violation of a constitutional right, and not a question of abuse of discretion, is at issue. See: *Evans* v. *United States*, 397 F.2d 675 (D.C. Cir. 1968); at p. 677, Note 3.

Petitioner's proposal not only shifts the burden to the wrong party, but employs the wrong standard. Contrary to petitioner's suggestion that the Second Circuit would apply such a test in the instant double jeopardy case, the "actual prejudice" test proposed was specifically rejected in a double

While such a request is not unprecedented in Double Jeopardy cases, an invitation to squarely hold that a Double Jeopardy violation can be harmless error in a "second prosecution" case, has never been accepted by the Court. The rejections have been well founded, and based upon reasons which lie at the heart of jeopardy protected interests.

In *Price* v. *Georgia*, 398 U.S. 323 (1970), the Court recognized that it would be inappropriate to attempt to resolve the question of the extent to which the inclusion of a jeopardy barred charge at trial may have influenced a verdict. Indeed, this Court's opinion in *Price*, *supra*, has been read[41] as holding that the Double Jeopardy rights of

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jeopardy context by the Second Circuit in *United States ex. rel. Hetenyi* v. *Wilkins*, 348 F.2d 844 (2nd Cir. 1965) with the following language:

> "The ends of justice would not be served by requiring a factual determination that the accused was actually prejudiced in his third trial by being prosecuted for and charged with first degree murder, nor would the ends of justice be served by insisting upon a quantative measurement of that prejudice." *Hetenyi*, *supra*, at page 864.

Hetenyi was, in turn, cited by this Court in rejecting application of a harmless error test to a double jeopardy violation in *Price* v. *Georgia*, *supra*.; and its reasoning readopted by the Second Circuit in 1979 in a *double jeopardy*, rather than joinder, context, in *Graham* v. *Smith*, 602 F.2d 1078 (2nd Cir. 1979).

The burden and test, if any, which ought to be applicable here were set forth in this Court's cardinal harmless error case, *Chapman* v. *California*, 386 U.S. 18 (1967), where the Court said that the burden was on the prosecution to establish the harmlessness of the error and that reversal was required unless the Court is "able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman*, *supra*, at page 24. Both *Hetenyi* and *Chapman* in formulating their tests, used the "reasonable possibility" language of *Fahy* v. *Connecticut*, 375 U.S. 85 (1963). See: *Hetenyi*, *supra*, at p. 864; *Chapman*, *supra*, at p. 24.

> "Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless." *Chapman*, *supra*, at page 24.

A fortiori where a barred trial was conducted.

[41] Wright, *Federal Practice and Procedure*, Criminal 2nd, § 855, at page 329.

an accused are among those selected constitutional guarantees,[42] the violation of which is necessarily harmful, requiring automatic reversal, and therefore not subject to a harmless error test.[43] The concerns expressed in *Price* lie at the heart of harmless error and modification issues when those issues are presented within the context of a Double Jeopardy violation.

Accordingly, the question presented here includes the following questions for resolution by the Court:

(a) whether this court's decision in *Price* v. *Georgia*, 398 U.S. 323 (1970) should be overruled in part, thus allowing a harmless error test to be applied to a Double Jeopardy violation;

(b) if so, whether the test should be applicable to every Double Jeopardy violation; or, conversely, whether there are some types of violation of the Double Jeopardy Clause to which it should not apply;

(c) if there are some types of Double Jeopardy violations to which the test should not apply, how those types

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[42] See *Chapman* v. *California*, 386 U.S. 18 (1967) at page 23, Note 8.

[43] In *Price* v. *Georgia*, 398 U.S. 323 (1970) the State of Georgia suggested that this Court apply *Chapman* v. *California*, 386 U.S. 18 (1967) to an "implied acquittal" type of Double Jeopardy violation. The Court declined the invitation. The Court did so by finding application inappropriate, not only because of a foreseen difficulty in resolving issues related to the probable outcome of a jeopardy permitted trial, but because of the nature of the Double Jeopardy Clause itself and of the interests it is designed to protect:

> ". . . Georgia submits that the second jeopardy was harmless error when judged by the criteria of *Chapman* v. *California*, 386 U.S. 18 (1967), and *Harrington* v. *California*, 395 U.S. 250 (1969).
>
> We must reject this contention. The double jeopardy clause, as we have noted, is cast in terms of the risk or hazard of trial and conviction, not of the ultimate legal consequences of the verdict. To be charged and to be subjected to a second trial for first degree murder is an ordeal not to be viewed lightly. Further, and perhaps of more importance, we cannot determine whether or not the murder charge against the petitioner induced the jury to find him guilty of the less serious offense of voluntary manslaughter rather than to continue to debate his innocence. See *United States ex. rel. Hetenyi* v. *Wilkins*, 348 F.2d 844 (C.A. 2nd Cir. 1965), *cert. denied*, 383 U.S. 913 (1966)." *Price*, *supra*, at page 331-332.

of cases should be defined or identified; and, as so defined, whether this is a case to which such a test should not apply;

(d) if this is a case to which a harmless error test is applicable, or, if the test should apply to all Double Jeopardy violations, (1) upon whom should the burden of proof be placed and what standard should be used in applying the test; and (2) applying the test to the facts of this case, whether it can be said that the violation of respondent's Double Jeopardy right was rendered harmless *by the modification?*

As a collateral matter, this case presents the question of whether respondent's Double Jeopardy rights were violated in that the doctrine established by this Court in *Ashe* v. *Swenson*, 397 U.S. 436 (1970) should have prevented litigation of the robbery element of the barred aggravated murder offense (and thereby litigation of that offense) at respondent's trial.[44]

B

Implied in recognition of the need to modify a conviction resulting from a jeopardy barred trial is recognition that the result was the product of *prejudicial* error. In suggesting that the modification "cures" the violation, one is necessarily applying some form of harmless error test, taking into account the result *as modified*. Thus, implied

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[44] A question left open in *Brown*, *supra*, at page 166-167; N.6:

"Because we conclude today that a lesser included and a greater offense are the same under *Blockburger*, we need not decide whether the repetition of proof required by the successive prosecutions against Brown would otherwise entitle him to the additional protection offered by *Ashe* and *Nielsen*."

Respondent should not suffer a dilution of his Double Jeopardy rights in this respect by virtue of having admitted his guilt rather than having gone to trial, but agrees that a different situation is presented "where the State has made no effort to prosecute the charges seriatim." *Ohio* v. *Johnson*, ____ U.S. ____; 104 S.Ct. 2536 (1984); P. ____ Note, 9.

in the modification is, at least, recognition of the need for application of the test.

But suggesting application of the test taking into account the result *as modified* rather than the actual result, itself demonstrates why the test should be inapplicable to any Double Jeopardy violation. The violation of a Double Jeopardy right which permits prosecution of a barred offense is not prejudical or harmless depending upon the outcome[45] of the trial. It is prejudicial because the trial was conducted; regardless of the outcome.

> "The elements of [the claim that the Double Jeopardy Clause prohibits trial] are completely independent of [a defendant's] guilt or innocence." *Abney* v. *United States*, 431 U.S. 651 (1977); P. 660.

II. Because Of The Unique Nature Of The Interests Protected By The Double Jeopardy Clause, It Is Not Appropriate To Apply Any Form Of A Harmless Error Test To A Double Jeopardy Violation.

A

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution is, with regard to the nature of the interests it was designed to protect, different in kind from other guarantees embodied in the Bill of Rights.

> "While this guarantee, like the others, is a constitutional right of the criminal defendant, its practical result is to prevent a trial from taking place at all, rather than to prescribe procedural rules that govern the conduct of a trial." *Robinson* v. *Neil*, 409 U.S. 505 (1973); at page 509.

In *Abney* v. *United States*, 431 U.S. 651 (1977), while holding that the unique nature of the clause makes denial of a non-frivolous former jeopardy claim immediately

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[45] See: Notes 52, 53; *infra*.

appealable, this Court, in commenting on the protection's distinctiveness, reiterated that it was against being put to trial, and against the "potential or risk of trial and conviction"[46] that the clause was intended to protect:

> ". . . the very nature of a Double Jeopardy claim is such that it is collateral to, and separable from, the principal issue at the accused's impending criminal trial, i.e., whether or not the accused is guilty of the offense charged. In arguing that the Double Jeopardy clause of the Fifth Amendment bars his prosecution, the defendant makes no challenge whatsoever to the merits of the charge against him. Nor does he seek suppression of evidence which the government plans to use in obtaining a conviction. See *DiBella* v. *United States*, *supra*; *Cogen* v. *United States*, 278 U.S. 221 (1929). Rather he is contesting the very authority of the government to hale him into court to face trial on the charge against him. *Menna* v. *New York*, 423 U.S. 61 (1975); *Blackledge* v. *Perry*, 417 U.S. 21, 30 (1974); *Robinson* v. *Neil*, 409 U.S. 505, 509 (1973). The elements of that claim are completely independent of his guilt or innocence." *Abney*, *supra*, at page 659-60.[47]

It follows that where a violation of the Double Jeopardy Clause is found implicit in that finding, more obvious when the violation has resulted in a conviction, lies the concurrent finding that the violation, by virtue of the nature of the protected right, is prejudicial to the accused. The opinion of this Court in *Price* v. *Georgia*, *supra*, (part (2)) has been fairly read[48] as holding that application of a

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[46] *Breed* v. *Jones*, 421 U.S. 519 (1975), at page 532; quoting *Price* v. *Georgia*, *supra*, at page 329.

[47] "Jeopardy denotes risk.", *Breed* v. *Jones*, *supra*, at page 528; "It is a guarantee being twice put to *trial* for the same offense.", *Abney*, *supra*, at page 661, (Emphasis in the original); and ". . . thus protects interests wholly unrelated to the propriety of any subsequent conviction." P. 661. It protects against "*exposure*." P. 662 (Emphasis in the original).

[48] Note 41, *supra*.

harmless error test to a Double Jeopardy violation is inappropriate. The reasoning which suggests this holding, set forth at length in *Abney*, *supra*, and directly related to the nature of the protected interests, is sound, and should not now be abandoned.

> ". . . where the Double Jeopardy Clause is applicable, its sweep is absolute. There are no "equities" to be balanced for the Clause has declared a constitutional policy, based on grounds which are not open to judicial examination."[49]

If a conviction resulting from a counseled plea of guilty must be set aside where the underlying charge was jeopardy barred, then surely modification is not an appropriate remedy where the accused not only denied his guilt, but contested the very authority of the state to take him to trial. See: *Menna* v. *New York*, 423 U.S. 61 (1975). Where the very *conducting* of a trial constitutes the violation, that violation cannot be "cured" by changing the *result* of the trial.

B

As applied here, the violation permitted a trial to take place which never should have occurred, and the trial resulted in respondent being convicted and sentenced for aggravated murder. The error was obviously prejudicial; and, indeed, petitioner has conceded this.[50]

The violation being conceded, and the right violated being one which guaranteed that the trial would not take place at all, as opposed to one insuring that it would be fair, it follows that any conviction which might have resulted was unlawfully obtained,[51] i.e., as a matter of

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[49] *Burks* v. *United States*, 437 U.S. 1 (1978); p. 11, Note 6.

[50] See: Note 36, *supra*.

[51] This would, of course, also be true if violation of a constitutional right designed to insure the *fairness* of the trial were found to have been prejudicial rather than harmless. That here a Double Jeopardy right is at issue simply makes the argument stronger, by virtue of the protected interest.

law, such conviction did not exist because the trial itself was void *ab initio*. No valid conviction existing as a matter of law, there was nothing for the Licking County (Ohio) Court of Appeals to modify; and accordingly, the only appropriate action to be taken by that Court was further remand to the Court of Common Pleas, for dismissal of the jeopardy barred indictment.[52]

To argue that a harmless error test can be applied taking into account the conviction *as modified*, is to assume the validity of the conviction as it existed prior to modification;—i.e. is to assume that there was a valid conviction *to be* modified. This assumes too much where the constitutional right violated was one designed to insure fairness, *a fortiori* assumes too much where the right violated was one designed to prohibit the trial in its entirety.

To concede that modification of conviction and sentence is necessary to "cure" the Double Jeopardy violation, is to concede that the violation constituted prejudicial, and not harmless, error. To concede prejudicial error is to concede that there was no valid conviction to be modified. Stated differently, if error occurred which was prejudicial to the

[52] The Sixth Circuit Court of Appeals rejected this argument on the basis of *Tapp* v. *Lucas*, 658 F.2d 383 (5th Cir. 1981). Respondent argues here that reliance on *Tapp* was improper in that that case was itself improperly decided for reasons set forth in *Price* v. *Georgia*, *supra*.

The *Tapp* court reasoned, in applying *Price* v. *Georgia*, that the *outcome* of the barred prosecution was the dispositive factor in deciding whether application of a harmless error test to determine prejudice was appropriate. Such reasoning was rejected by this Court in *Price* itself, where, in citing *Green* v. *United States*, 355 U.S. 184 (1957), a case in which, like *Tapp* and unlike *Price*, the barred trial had resulted in conviction of the greater offense, this Court said that such a factual distinction is irrelevant. See: *Price*, *supra*, at page 329.

Moreover, *Tapp* was an "implied acquittal" case. The fact that the instant case is of a second and separate prosecution variety, carries significant implications as to the appropriateness of applying a harmless error test. See: *infra*, III.

accused, there was no valid conviction *to* modify; but if no error occurred, or error occurred which was harmless, then there was no *need* to modify.

Any suggestion that the question of harmlessness can be resolved taking into account the conviction *as modified* demonstrates the inappropriateness of applying the test, in that it assumes the existence of a valid conviction to be modified, while at the same time, self-contradictorily admits that the process through which the conviction was obtained was so prejudicial to the accused as to demand modification.[53] The self-contradiction is unavoidable because of the nature of the clause. A Double Jeopardy violation cannot be harmless error, by virtue of the nature of the protected interests. The violation lies in the trial, not in the result.

That here the defendant was convicted of a barred offense is irrelevant to the question of whether the violation was prejudicial, because it is the *trial* that is prohibited, and only consequentially, the verdict. Had respondent been acquitted, his rights would have been nonetheless violated. It is exposure to conviction which is prejudicial, and that prejudice cannot be cured through modification. The fact of conviction of the barred offense is relevant, however, to the question of whether a harmless error test should be applicable to a Double Jeopardy violation, in that the perceived need to modify the barred verdict demonstrates why the violation is always preju-

[53] If the respondent had been convicted at his jeopardy barred trial of murder, a permitted offense, *then* what Ohio is asking be done here would be akin to application of a harmless error test to a constitutional violation. The question would be whether, given that the defendant was convicted of only a jeopardy permitted offense, the returning of that verdict rendered trial on the barred offense harmless. But given a Double Jeopardy violation, the conducting of the test even under those circumstances (i.e., murder conviction) would be no less inappropriate. A result-oriented approach to analysis of the Clause tends to overlook the fact that it is the trial, and not its outcome, that is prohibited. See: Note 52; *supra*.

dicial. Convicting the respondent was an incidental prejudice; the clause prohibited his being tried. To permit modification is to redefine the protected rights.

Only if it can be said that a conviction which resulted from a "second prosecution" type Double Jeopardy violation can be subjected to a harmless error test, and then be further said that, applying the test, the error was harmless; can the conclusion be reached that Mr. Mathews was not prejudiced and that no new trial is warranted. Here, for three reasons, it is impossible to reach that point.

First, the harmless error test is inapplicable to all Double Jeopardy violations by nature of the clause; *supra*. Second, even if a harmless error test should be held applicable to some Double Jeopardy violations, it is inapplicable to "second prosecution" violations, by nature of the violation; *infra*. And finally, if the test were to reach even "second prosecution" type violations, its application here compels the conclusion that the error was prejudicial; *infra*.

Accordingly, the decision of the United States Court of Appeals for the Sixth Circuit should be affirmed.

III. If The Nature Of The Double Jeopardy Clause Does Not Prohibit Application Of A Harmless Error Test To Its Violation, The Nature Of This Specific Violation Does.

A

Notwithstanding the decisions in *Abney, supra*, and *Price, supra*, the court might now be prepared to decide, given multiple punishment violations, admission of evidence arguably barred under collateral estoppel principles and increasing difficulty in applying the Double Jeopardy Clause to complex predicate-offense[54] and com-

[54] See: *Garrett* v. *United States*, ____ U.S. ____; 105 S.Ct. 2407 (1985); No. 83-1842, decided June 3, 1985; see, also, opinion of Mr. Justice Rehnquist, dissenting, in *Whalen* v. *United States*, 445 U.S. 684, (1980).

pound-offense statutes, that there might be *some types* of violation of Double Jeopardy rights which could properly be subjected to a harmless error test.[55] Even so, the right to be free from successive and independently brought prosecutions for the same offense, as distinct from other violations of the clause (i.e., implied acquittal cases; multiple punishment cases; aborted trial or mistrial cases), is the type of violation least amenable to application of the test. By virtue of its nature the protection against successive prosecutions brings into play factors which lie closer to the heart of the Double Jeopardy prohibition.[56]

In successive prosecution cases, the dispositive question is usually whether the offenses are the "same offense" for Double Jeopardy purposes. *(Garrett, supra.)* A find-

[55] Another available approach is to formulate a different test applicable to all types. Taking into account the various types of Double Jeopardy violations which can occur, there is a temptation to suggest that a test applicable to all types should turn on whether, putting the accused in a position he occupied before the violation, litigation of *factual* matters relevant to the outcome would be necessary to resolve the case (See: *United States* v. *Jenkins*, 420 U.S. 358 (1975); overruled by *United States* v. *Scott* 437 U.S. 82 (1978); and also *Lee* v. *United States*, 432 U.S. 23 (1977), modification being inappropriate where further factual litigation is necessary. Analysis suggests however, that this test is also unworkable.

Wrestling with the question of identifying some double jeopardy violations with regard to which appellate modification would not offend double jeopardy interests, suggests absurd hypotheticals. In some select multiple punishment cases, however, only a single result may be lawfully obtainable. Formulating a general test which would permit modification in such cases while protecting jeopardy interests as to more "severe" forms of violation of the clause, suggests that

> Where placing the defendant in the position he occupied before the violation would require no litigation of factual matters, and would permit, as a matter of law, only one possible resolution of the case, modification to that result does not offend the Double Jeopardy Clause.

This test is so restrictive as to suggest, as argued above, that the clause does not lend itself to harmless error analysis.

[56] "What lies at the heart of the Double Jeopardy Clause is the prohibition against multiple prosecutions for "the same offense"; Mr. Justice Stevens dissenting, in *Garrett* v. *United States*, *supra*, citing *United States* v. *Wilson*, 420 U.S. 332 (1975).

ing that the successive prosecutions were for the "same offense" strongly suggests, if indeed it does not constitute, a finding of impermissible governmental overreaching. Resolution of the identity of offenses question would usually resolve any related modification issue. Given that there is always a reasonable possibility[57] that prosecution on a permitted offense would produce a different result from that reached through prosecution of the barred offense, as modified, this Court, as recently indicated in *Ohio* v. *Johnson*, ___ U.S. ___ (1984), has looked to the question of prosecutorial overreaching as a significant factor to be considered in deciding whether successive prosecutions of the "same offense" ought to be permitted.

B

Brown v. *Ohio*, 432 U.S. 161 (1977), was decided in June, 1977. Trial of the case at bar took place in August, 1978. The argument which took place immediately prior to trial on the Motion to Dismiss the Indictment on Double Jeopardy grounds shows that, at the time of trial, both parties to the litigation were aware of the *Brown* decision.[58] Under that decision, prosecution of the felony murder charge was barred. Nonetheless, the state insisted upon going forward with that charge and the trial judge, with no explanation of his reasoning, denied the motion to dismiss.[59]

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[57] See: Part IV, *infra*.

[58] R. page 18, et. seq.

[59] "This is purely a matter of law, and the court makes a general ruling on the matter and overrules your motion. The court has spent considerable time on this I will say and for many of the reasons you set forth, Mr. Cooper, I come to the contrary conclusions however. Now, with respect to the second motion argued . . ." (R. 75-76).

In arguing the Double Jeopardy issue the prosecutor relied on *State* v. *Duvall*, 111 Ohio St 657 (1924) and on the exception set forth in *Brown* v. *Ohio*, *supra*, at P. 169, note 7. (R. 18 et. seq). *Duvall* was implicitly overruled by *Brown* as applicable through *Benton* v. *Maryland*, 395 U.S. 784 (1969); and the exception is clearly inapplicable. See: *infra*, Note 27; *supra*, Note 36.

This is not an "implied acquittal" or "mistrial" type Double Jeopardy violation where proceeding on the jeopardy barred offense on a second occasion could be considered a "continuing jeopardy." This case, instead, clearly constitutes the bringing of a second, separate and jeopardy prohibited prosecution, of the "same offense" as that to which the accused had earlier plead guilty.[60]

That this is a "second bite" prosecution is true under *Blockburger* analysis (*Blockburger* v. *United States*, 284 U.S. 299 (1932)) as interpreted and applied in *Brown* v. *Ohio*, *supra*, or under *Illinois* v. *Vitale*, 447 U.S. 410 (1980), whether or not that case is read as having supplemented the traditional *Blockburger* "elements" test with a new "evidentiary" test.[61] It is also true to the extent that the collateral estoppel aspect of the Double Jeopardy protection recognized in *Ashe* v. *Swenson*, 397 U.S. 436 (1970) applies to facts resolved by virtue of a guilty plea,[62] and should have prohibited the introduction of robbery evidence at the jeopardy barred second prosecution.

Recognizing that *Illinois* v. *Vitale*, *supra*, had not been decided at the time of this trial, there were, nonetheless, at least four United States Supreme Court decisions extant, two suggesting and the other two squarely holding that the prosecution which the state sought to bring in this case, was jeopardy barred. Moreover, one of those so holding was an Ohio case which had been decided by this

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[60] To the extent that Ohio argues that this is not a successive prosecution case, but that the aggravated murder statute under which respondent was convicted is ". . . in reality an enhancement provision mandating increased punishment . . ." (Brief of Petitioner at p. 24), it adopts a position recently rejected by the United States Department of Justice. See: Brief for the United States, *Garrett* v. *United States*, ___ U.S. ___ (1985); No. 83-1842. Decided June 3, 1985; at p. 22-23.

[61] See: Opinion of Mr. Justice Rehnquist dissenting in *Thigpen* v. *Roberts*, ___ U.S. ___ (1984); No. 82-1330, decided June 27, 1984.

[62] See: Note 44, *supra*.

Court only a year prior to trial.[63] Though it is true that here there has been no allegation of prosecutorial bad faith[64] the "state of double jeopardy jurisprudence"[65] was, as to the issue of whether this aggravated murder charge was barred, not only far from "unsettled"[66] but had been resolved in respondent's favor.

Further, a period of three full months passed between the date of respondent's arrest (February 17, 1978) and the date (May 17, 1978) on which respondent entered guilty pleas, with no objection from Ohio,[67] to the only charges which Ohio saw fit to prosecute.[68]

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[63] *Brown*, *supra*, said that the sequence of convictions was immaterial; *Harris* v. *Oklahoma*, 433 U.S. 682 (1977) said that the second prosecution was barred. See: *Illinois* v. *Vitale*, *supra*, at P. 421.

[64] See: Brief of Petitioner at page 36. Ohio apparently assumes that respondent's failure to alledge prosecutorial bad faith has been based upon belief rather than perceived need. If so, Ohio's assumption is premature, unfounded, and incorrect.

That Ohio thought it necessary, at trial, to argue that prosecution was permitted here under the *Brown* exception, (432 U.S. 161; 169, Note 7) itself demonstrates that the state was aware of the general rule and holding of *Brown*. At least three different courts have most recently rejected the contention that this charge was jeopardy permitted. Yet Ohio insists upon contradicting itself (See: Note 36, *supra*.) by persisting in the suggestion that there was no error in bringing it.

[65] *Id.*

[66] *Id.*

[67] Unlike *Ohio* v. *Johnson*, ____ U.S. ____ (1984).

[68] Ohio suggests that ". . . at the time of respondent's arrest, the prosecution was *not* possessed of sufficient information so as to reasonably seek an indictment charging respondent with the death . . ." and that the two reasons for this were ". . . respondent's initially false statements and the Coroner's wholly inexplicable assessment of the cause of death." (Brief of respondent at page 29).

Ignoring the fact that this suggestion begs the question in that it is not the time of *arrest* which is relevant here: (a) not only is it a rare prosecutor who decides whether to charge a homicide based solely upon the statements of the accused, but the accused here admitted that his initial statements were false within a few hours of having given them; and, (b) an autopsy had been conducted by a pathologist whose later trial testimony was that the killing could not have been suicide. The autopsy was performed on February 18, 1978, apparently (R. 362) at the request of the Licking County Prosecutor, and the report completed by March 9, 1978 (R. 409), well before the guilty plea to the robbery offense was entered, with no objection from the state.

Ohio was faced with no "Hobson's Choice" here of "proceed[ing] on the bank robbery charge or releas[ing] respondent." (Brief of Petitioner at 29-30). It could surely have charged a homicide either immediately after arrest or after later receipt and consideration of the autopsy report.

> "A defendant has no duty to bring himself to trial; the state has that duty as well as the duty of insuring that the trial is consistent with due process." *Barker* v. *Wingo*, 407 U.S. 514, 527 (1972); (footnotes omitted).

[69] *Ohio* v. *Johnson*, ____ U.S. ____ (1984), at p. ____; citing *Arizona* v. *Washington*, 434 U.S. 497 (1978).

[70] Respondent here does not agree that this is a "spillover" case involving multiple charges or multiple defendant's at one trial. (Brief of Petitioner, P. 34). Nor does respondent agree that the *Benton* v. *Maryland*, 395 U.S. 784 (1969) conclusion that it was appropriate to remand for consideration of harmlessness, has survived *Price* v. *Georgia*, *supra*. Nor that "there exists no requirement of automatic reversal" in cases of successive prosecution of the same offense.

> "There is nothing novel about the rule that a defendant may not be tried for a greater offense after conviction of a lesser included offense. It can be traced back to *Blackstone*, and 'has been this Court's understanding of the Double Jeopardy clause at least since *In re Nielsen*, [131 U.S. 176] was decided in 1889,' *Brown* v. *Ohio*, *post*, at 168. I would not permit the prosecutor to claim ignorance of this ancient rule, or to evade it by arguing that the defendant failed to advise him of its existence or its applicability." *Jeffers* v. *United States*, 432 U.S. 137 (1977); Mr. Justice Stevens dissenting in part, and concurring in the judgment in part, at page 158.

Here, the state clearly had its "one full and fair opportunity to convict those who have violated its laws."[69] Accordingly, permitting application of a harmless error test to a Double Jeopardy violation of this nature would, by virtue of its incorporated failure to absolutely prohibit the type of prosecutorial overreaching here involved, offend interests the clause was designed to protect.[70]

C

Assuming both (a) that a harmless error test is applicable to some Double Jeopardy violations, and (b) that the result of the barred trial here had been conviction of a permitted offense, it would still be inappropriate to allow application of the test to such violation, not only because of prosecutorial overreaching in bringing the barred second charge, but because of the inability of an appellate court to accurately predict the outcome of a jeopardy permitted trial. If it is inappropriate to use a harmless error test in deciding whether or not an "implied acquittal" violation is prejudicial *(Price, supra)*, it is even more inappropriate to use it in deciding whether a "second prosecution" Double Jeopardy violation, which resulted in conviction of the jeopardy barred offense, was prejudicial.

Whether under a *Blockburger, Vitale*, or *Ashe* v. *Swenson* analysis, a finding that a second prosecution was jeopardy barred necessarily means that prosecution of a permitted offense would have taken place under different circumstances. The changes in circumstances, given the nature of the constitutional protection, would entail changes in the elements of the offense(s), changes in evidentiary matters or, more probably, in both. Because a greater offense, by definition, includes elements which are not a part of the lesser, only an unusual greater offense trial would not include some evidence relevant only to proof of those additional elements which are part of the greater, but not the lesser, offense. As found by the Sixth Circuit Court of Appeals,[71] the instant matter was certainly not such a case.

To suggest that at a jeopardy permitted trial, any evidentiary changes would be insignificant,[72] is not only to

[71] See: § IV, *infra*.

[72] Brief of Petitioner at page 37.

question the foundations underlying the Double Jeopardy Clause as applied through the *Blockburger* test for identification of the "same offense," but to imply that Double Jeopardy protections might be side-stepped through a change in the form of an indictment.

Respondent does not agree that all significant prosecution evidence admitted at what, under *Blockburger* analysis, was, in the instant case, a barred trial, would necessarily have been admissible at a *Blockburger* permitted trial.[73] Nor that significant defense evidence excluded would necessarily have been excluded. Those conclusions suggest in themselves the need for re-examination of the *Blockburger* test as being sufficient to protect Double Jeopardy interests; an issue not presented here. Here that test was appropriate. Under the suggested circumstances, a barred trial would effectively be permitted by virtue of a change in the title of an indictment. Through a change in form the prosecution could do what the clause prohibits being done in substance. Such a result being intolerable to the clause itself, any modification which brings it about ought to be equally intolerable.

In addition, modification by prediction necessarily assumes that defense strategy, tactical decisions, and argument, as well as evidentiary presentation, would have remained the same at a permitted offense trial. Such assumptions replace trial court decisions and legitimate arguments—which the defendant has a right to make with the assistance of counsel and within the atmosphere of actual trial proceedings on a jeopardy-permitted offense—with appellate guessing, based upon the cold record of a barred trial. Allowing such a procedure undermines the adversary process by further assuming that the appellate judge(s) will be as capable and diligent, in recognizing and researching trial-related issues, and often com-

[73] See: § IV, *infra*.

plex evidentiary issues, as would an experienced defense attorney whose primary dedication is to the cause of his client.[74]

Even assuming the ability of the appellate judge(s) to ignore evidence prejudicial to the defense which appears in the transcript but which would have been inadmissible at a permitted trial,[75] such a procedure denies the defendant his right to have had those decisions made by the trial judge; properly under the influence of a jeopardy permitted charge, and taking into consideration factors which the record on appeal might not reveal.

Predicting the outcome of a jeopardy permitted trial thus becomes an exercise in speculation, of the type condemned by the Second Circuit Court of Appeals in both *Hetenyi* v. *Wilkins*, *supra*, and *Graham* v. *Smith*, 602 F.2d 1078 (2nd Cir. 1979), even in "implied acquittal" cases.

Thus, independent of analysis of different evidentiary issues which would have been presented at a jeopardy

[74] In neither the written opinion of the Licking County (Ohio) Court of Appeals ordering modification, nor that of the United States District Court for the Southern District of Ohio approving of such modification, is there any discussion of whether pretrial, evidentiary, and jury instruction issues might have been differently presented at a jeopardy permitted trial, given the differences such a trial would have made in both the elements of the offense, and the applicable concept of relevancy. Nor is there any statement in either opinion that such questions, though not discussed, had been considered and resolved in favor of the State. The Sixth Circuit Court of Appeals addressed these questions.

[75] In this manner, a "second prosecution" type violation where the second prosecution, as here, is of the greater offense, infects the entire appellate process. Evidence which may have been inadmissible on a lesser charge, not only becomes part of the record but must be emphasized by the accused on appeal in order to demonstrate prejudice if a harmless error analysis is used. This is itself a reason for immunizing this type of violation from application of a harmless error test, as well as for distinguishing, within the class of "second prosecution" Double Jeopardy violations, cases in which the second prosecution is of the greater offense, from those in which it is of the lesser. See: *Harris* v. *Oklahoma*, 433 U.S. 682 (1977).

permitted trial in this particular case, there are sound reasons lying both in the nature of the clause and in the nature of the type of violation here at issue, for rejecting application of a harmless error test.[76]

D

Here, Ohio seeks to remedy the error in the bringing of the second prosecution by adjusting the conviction and punishment, in recognition of the fact that there has already been a conviction and punishment for the lesser and "same" offense.

This Court has already suggested that such an adjustment will not "cure" the prejudice in "second prosecution" situations:

> "Any adjustment in punishment for the fact that the defendant already has been punished for the lesser offense is not adequate to cure the injury suffered because of multiple prosecutions, since the Double Jeopardy problem inheres in the very fact of a second trial for the 'same' offense. See *Blackledge* v. *Perry*, 417 U.S. 21, 30-31 (1974); *Price* v. *Georgia*, 398 U.S. 323, 329 (1970)." *Jeffers* v. *United States*, *supra;* Mr. Justice Blackmun on behalf of four members of the Court, at page 151, n.18.

A difference between "implied acquittal" cases (relied upon by the Sixth Circuit here in rejecting the argument

[76] More than one Circuit Court of Appeals, as well as this Court itself, has suggested that in addition to differences in verdict which might be founded upon a reasoned analysis of the elements of the offense and supporting evidence, a right to trial necessarily includes an opportunity to benefit from the decision of a "maverick" jury:

> "It has long been recognized that criminal juries in the United States are free to render "not guilty" verdicts resulting from compromise, confusion, mistake, leniency or other legally and logically irrelevant factors. *Dunn* v. *United States*, 284 U.S. 390, 393-94, 52 S.Ct. 189, 190-91, 76 L.Ed. 356 (1932)." *United States* v. *Price*, 750 F.2d 363 (5th Cir. 1985).

See: *United States ex. rel. Hetenyi* v. *Wilkins*, *supra*, at p. 866; *United States* v. *Wilson*, 629 F.2d 439 (6th Cir. 1980) at p. 443; *United States* v. *Mespoulede*, 597 F.2d 329 (2nd Cir. 1979) at p. 337.

that a harmless error test is inapplicable) and "second prosecution" cases (represented by the instant case), lies not only in prosecutorial overreaching, but in predictability of the outcome of a jeopardy permitted trial. In "implied acquittal" cases, the prosecutor seeks, albeit through improper means (continuing prosecution of a barred charge), only that single conviction which he believes is warranted; and seeks it only through a single prosecution (the subsequent trial(s) necessitated by reversal on appeal). If, in an "implied acquittal" case the same strategies, tactical decisions, evidentiary presentations, and arguments are used by both parties to the litigation at the subsequent trial(s), ability to predict an outcome is arguably enhanced.

In "second prosecution" cases, however, the overreaching, by definition, has passed permissible limits; and predictability—given the wide variety of possible differences in strategy, tactics, evidence, arguments and instruction which might be brought about by the change in elements of the offense—is so severely restricted that it cannot begin to pass reasonable doubt muster, regardless of the nature of a particular case.

Harmlessness is a relative concept that has meaning by virtue of comparison. It is difficult enough for an appellate court, to address the issue where identifiable pieces of evidence are involved, and where the admissibility questions had actually been raised and decided at trial. But when the violation of the Double Jeopardy Clause is of a "second prosecution" variety, what is required is that a court of appeals take an additional step. The court cannot apply the test as it usually would, because analysis involves not a piece of evidence being compared to other evidence, but an entire trial being compared to one which did not take place. The court must, instead, assume the position of the defense at a permitted trial, and attempt to make the strongest arguments possible on issues which

were not in fact raised below, because they had been rendered irrelevant when the state was permitted to proceed on a jeopardy barred charge. The court, having identified the issues, would research and draft arguments, and then address and resolve the arguments, before reverting to its appellate role in applying the harmless error test.

Only if it could properly be said that every court of appeals would always do fully as much in identifying and arguing these issues as would counsel for a defendant, could one begin to suggest that the rights of the accused would be adequately protected by such a procedure. The suggestion, however, undermines the foundation upon which the adversary system is built. The functions are better left to adversary litigation at the trial level.

In other contexts, a harmless error analysis is perhaps appropriate. Permitting modification as a remedy in a "second prosecution" case, however, would not only tend to foster carelessness in deciding whether to bring (prosecutor) or to dismiss (prosecutor or judge) an arguably barred charge, notwithstanding *Abney, supra;* but will inevitably force appellate consideration of issues involving harmlessness within harmlessness;—for example, violation of a confrontation right at a jeopardy prohibited trial. Conversely, prohibiting modification in "second prosecution" cases will remove an otherwise significant appellate burden in each individual case, by insuring that the protection afforded by the Double Jeopardy Clause is carefully analyzed at the trial level forum, where a more extended application of the adversary process is often attainable.

The evil here also runs deeper because modification under these circumstances substitutes an appellate court verduct for trial by jury, and forces the appellate court into the role of prosecutor and grand jury, in that it assumes that indictment would necessarily have been

sought and obtained on an offense which could have yielded the modified verdict. The requirement demands of appellate judges that they unravel issues which the Constitution suggests are better resolved prior to, and at, trial.

Accordingly, not only on the basis of the clause and the modification, but on the basis of the type of Double Jeopardy violation here at issue, application of a harmless error test ought to be rejected.[77]

IV. Application Of A Harmless Error Test In The Instant Case Compels The Conclusion That The Violation Of Respondent's Right To Be Free From Successive Prosecutions For The Same Offense Was Not "Cured" By The Modification.

A

The right to a fair trial must necessarily include the right to defend oneself, and to argue, through counsel,

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[77] Nor does conviction of the greater offense on which instructions were given at a barred trial preclude the possibility that the verdict was improperly influenced by the bringing of that charge.

Had the felony murder charge been the only one ever brought against the respondent, trial on that charge could properly have encompassed instructions as to conviction of not only the lesser homicide offenses, but the aggravated robbery. Had the jury concluded that the defendant was guilty of robbery but not of homicide, that verdict could have been returned. Here, the jury was left without that option.

Trial on the barred charge precluded that result when the trial judge understandably refused to instruct on the robbery, while at the same time twice giving an instruction ("The purpose with which a person does an act is determined from the manner in which it is done the means or the weapons used *and all the other facts and circumstances in evidence*" (Emphasis added.) (R. 805; 808)) which permitted the robbery evidence to be considered in deciding guilt or innocence as to the charged homicide offenses. Though it is true that here the most severe homicide verdict was returned, one cannot exclude the possibility that the failure to charge on the robbery or on manslaughter (thus leaving only the options of conviction of relatively heinous offenses or acquittal), when combined with the instructions, was viewed, by a jury ignorant of the earlier plea, as implicitly reflecting an opinion of the court; and, accordingly, influenced the verdict.

and pursuant to the Rules of Evidence, that certain evidence should not be admissible. The decisions made on such arguments should be made by a trial judge guided by a concept of relevancy which is in turn based upon a proper indictment. At a jeopardy permitted trial, a defendant has these rights. At a barred trial, they are denied.

Here, at a jeopardy permitted trial conducted after the plea and sentencing on the aggravated robbery had been completed, a legitimate question could have been raised as to the admissibility of *any* proof of the bank robbery under *Ashe* v. *Swenson*, *supra*. Ohio would, under permitted trial circumstances, have been conceding that a felony murder could not be charged, rather than arguing, as it did here, that the charge was permissible. Accordingly, the fact that the collateral estoppel question had been resolved against the respondent in allowing the barred trial here does not foreclose the possibility that at a permitted trial, respondent would have made a convincing argument that such evidence should not have been admissible. Respondent would certainly have been in a stronger position to argue that for the same reasons that recharging the robbery or charging the felony murder was barred by the Double Jeopardy Clause, proof of the robbery should have been equally barred under collateral estoppel principles. Implicit in the Supreme Court's having recognized the question and left it unresolved in *Brown*, *supra*, was the suggestion that it amounted to a colorable claim. The reasonable possibility of resolution of that claim in respondent's favor, surely suggests that the result of a permitted trial might have been more favorable to him than the result as here modified.

A nonexhaustive summary of further evidentiary questions which would have been appropriately raised at a permitted trial, even under a ruling that some robbery or flight evidence would be admissible, includes: (a) whether

other specific pieces of bank robbery or flight evidence would have been offered; (b) if so, under what theory; (c) whether legitimate or compelling arguments existed that such evidence should be held inadmissible; (d) whether an evidentiary hearing or balancing test should have been undertaken in deciding admissibility; and (e) whether limiting or cautionary instructions would have been appropriate or required in admitting any such evidence. These questions would reach not only issues presented as to independent evidence of the bank robbery, but issues presented as to what portion(s), if any, of statements made by the defendant would have properly been admissible. Thus, evidentiary questions alone, at a permitted trial, would have been both substantial and complex.[78] Depending upon the court's responses to these questions,

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[78] Ohio apparently suggests that extensive and detailed evidence of events surrounding the bank robbery was admissible under Rule 404(b) of the Ohio Rules of Evidence, as proof of motive and therefore of identity of the person who killed the victim. According to the state, motive was shown through respondent's having made an exculpatory statement claiming duress; and was an issue at trial because this initial statement was false. The argument is apparently that Ohio had the right to introduce extensive and detailed robbery evidence to prove lack of duress.

But the defense never claimed duress, and never made that an issue at trial. All of this evidence was introduced during the prosecution case in chief. Nor was any evidence introduced by the prosecution, independent of respondent's self-repudiated statements, that the intent to claim duress was first formed before, rather than after, the death.

What the state's argument amounts to is that the prosecution, having made duress an issue through introduction of respondent's statements, was then entitled to knock down this "straw man" through introduction of extensive robbery evidence, overlooking the fact that respondent had repudiated his own statement within a few hours of having given it.

Nor should the state, at a permitted trial, be allowed to do the same thing by first suggesting that respondent will claim "mercy killing" and then, still before the state rests, introduce evidence of propensity toward callousness or violence. Where the actual reason for an offer of testimony is to put prejudicial or irrelevant evidence before the jury, the court, in allowing such evidence, may well be denying the accused a fair trial. See: *United States* v. *McFadyen-Snider*, 552 F.2d 1178 (6th Cir. 1977).

a host of tactical decisions could have been made differently from the ways in which they were made at the barred trial.

Further, depending upon the evidence actually introduced at a permitted trial, a series of questions is presented as to appropriate jury instructions (i.e.—whether some of the evidence was admissible only for a limited purpose; whether further instructions should have been given as to lesser and included offenses) warranted at that trial. Had respondent, after the events of February 17, 1978, been charged only with the felony murder, that charge alone, putting aside evidentiary questions, could have carried significant changes in verdict options made available to the jury. At the trial which took place, respondent suffered adverse consequences of the court's refusal to charge on the underlying robbery. That refusal was not due to any miscreancy on respondent's part, but because the prosecution had already taken its "bite of the apple" with the robbery conviction. As a consequence, at the barred trial, not only was the "second bite" being taken, but the possibility of conviction was being enhanced through refusal of the court to instruct on robbery, because Ohio had already pursued and obtained a conviction of that offense.[79]

It is not reasonable to suggest that all evidentiary questions, tactical decisions, jury instruction issues, arguments, etc., could have been resolved in only one way at a permitted trial. Nor is it reasonable to believe that any difference in resolution of any one or combination of these issues, regardless of how significant the question, how early in the proceedings it was answered, or what its effect upon later decisions and events; would necessarily have made no difference in the verdict.

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[79] See: Note 77; *supra*. Thus, the state did "garner" something by respondent's earlier plea. (Brief of Petitioner, page 36).

The burden here is not properly placed upon the respondent to show that a different and more favorable result would have been achieved at a jeopardy permitted trial. The burden is upon the petitioner to show, beyond a reasonable doubt, that such a result could not have been achieved, and that, accordingly, the error was not prejudicial. Here, identification of the issues is sufficient to demonstrate the prejudice.[80]

B

The delicacy of the trial evidence as to the seriousness of the victim's wounds and as to accurately establishing the time of his death, made the question of guilt or innocence a close one, notwithstanding a contrary conclusion which might be drawn from conviction of the greater of the two homicide offenses as to which jury instructions were given.[81]There was no doubt, *under the court's instructions*, that *if* respondent killed the victim, he did so while fleeing from an aggravated robbery. Thus, resolution of the question of *whether* respondent killed the

[80] Surely the development of the administration of criminal justice in this country has passed the stage at which guilt or innocence of an accused may be permitted to rest upon the state's predictions of the admissability of "motive" evidence and the outcome of a trial. *Rhode Island* v. *von Bulow*, Providence Superior Court; N1/81-118. (Brief of Petitioner at page 36).

[81] Nor is length of jury deliberation necessarily indicative of the difficulty the jury may have had in reaching a verdict, as indicated by "hold-out" jurors. Here, the following exchange took place at trial when the verdict was announced:

> "THE COURT: Mr. Mathews, would you stand up please. Do you have anything to say on your own behalf, before the Court pronounces sentence?
>
> "MR. MATHEWS: I would like to know how they found me guilty of something I did not even do man . . . I wasn't even in the house when he shot himself . . . don't you realize that. They're all wrong, I was not even in the house.
>
> "THE COURT: Sit down, Mr. Mathews . . .
>
> "MR. MATHEWS: You're wrong, I swear on my Mother's life, you are all wrong, I wasn't even in the house.
>
> "THE COURT: Be seated please. The Jury having returned a verdict of guilty . . ." (R. 819).

victim resolved the question of whether the respondent was guilty of aggravated murder or of murder under the jury instructions which were given. The close question here, was not the *degree* of crime but *whether* respondent killed the victim; or whether (a) this was a suicide; (b) someone else killed the victim; (c) the second (chest) shot was fired into a dead body; or (d) this was a "mercy killing."[82]

The pathologist at this trial walked a tightrope in testifying that the head wound was necessarily the first of the two wounds to the victim, and that it (a) was too strong to leave the victim conscious (suicide impossible), but too weak to kill him quickly (second shot into a dead body, impossible). The pathologist having admitted that the head wound alone could have been lethal, pinpointing the exact time that the victim would have died from that wound alone became critical, and of substantial significance to the jury's resolution of guilt or innocence.[83]

What should have been a homicide trial was here broadened in scope, however, to include an additional bank robbery element. A portion of the always finite amount of time the defense has within which to prepare for trial, was accordingly spent concentrating on matters other than preparation for cross-examination of the pathologist or for the presentation of independent evidence related to crucial and sensitive homicide issues raised by the particular facts of the case.

Jurors considering this delicate balance of time of death and cause of death, and deciding which verdict to return, were exposed, by virtue of the violation of Mr. Mathews' constitutional rights, to evidence extremely prejudicial to

[82] At a permitted homicide trial the "mercy killing" issue becomes relevant to questions of intent and jury instructions, under Ohio statutes.

[83] There had been no evidence or even suggestion made at trial that the respondent had fired the shot which resulted in the head injury.

him, relevant to this case, if at all, through the existence of the jeopardy barred element of the offense. Under these circumstances, the error which allowed inclusion of the prohibited element of the offense could not have been harmless.

Once the decision was improperly made at the trial that the underlying bank robbery and flight therefrom would be elements of the offense, the door was opened to the prosecution's introduction of detailed evidence of these facts. Taking full advantage of the opportunity presented, the state offered proof, not simply of the *facts* of the robbery and chase to the farmhouse, but of details which exposed, for jury consideration, questions of character, propensity, lifestyle, veracity, and prior criminal involvement. The details were prejudicial to respondent both in quality and quantity; individually and cumulatively. As decided by the Sixth Circuit Court of Appeals, under the circumstances of this case it cannot be said that, beyond a reasonable doubt, such evidence was not prejudicial. To the contrary, it may well have tipped the scales.

C

In the statements given by the respondent on February 17th and May 31st, 1978, he denied any involvement with the death of Steven Daugherty. The primary basis of admissibility of these statements lay in proof of the underlying aggravated robbery. If related to the homicide at all, they were admissible only for a limited purpose.

At a jeopardy permitted homicide trial these statements would have been of questionable evidentiary value and arguably inadmissible in whole or in part. At the very least, they would have been introduced under cautionary or limiting instruction. It was, however, pursuant to introduction of these statements at the barred trial that the *prosecution* put respondent's veracity, character and propensity in issue before the defense had even had an opportunity to present its case. In so doing, the state introduced damaging evidence, which, at a permitted trial, would arguably have been barred under Rules 401, 403, 404, 607, 608, and 609 of the Ohio Rules of Evidence.

Further, in gratuitously advising the jury that other charges had earlier been brought against Mr. Mathews and disposed of, the authority of the Office of the County Prosecutor was used to alert jurors predisposed toward speculation about multiple robberies,[84] that in fact, respondent had been charged with more than one.[85]

D

Contrary to the position taken by the state, respondent admits that he cannot exhaustively identify, much less definitively resolve each of the many colorable evidentiary questions which might properly have been raised at a jeopardy permitted trial. Apart from evidentiary questions, he cannot unerringly predict what changes that trial would have encompassed in tactics, argument, jury instructions, and so forth. Accordingly, he cannot precisely predict the outcome of such a trial. But, with due respect to petitioner, no one can; and that is precisely the reason that the decision of the Sixth Circuit Court of Appeals should be affirmed.

James Mathews had the right to defend himself on a jeopardy permitted charge. When that right was taken from him by the unconstitutional bringing of a barred

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[84] See: Page 8, *supra*.

[85] See: Note 32, *supra;* and text.

"A criminal defendant who chooses not to testify at trial is entitled to a presumption of innocence. One sure way to destroy that presumption is for a seasoned officer to interject an "inadvertent" remark about a defendant's criminal history. We cannot accept the government's characterization of these types of remarks as "inadvertent," and regardless, the "touchstone of prejudice is not the motive of the one who introduces the testimony; rather, it is the effect of such testimony upon the jury. *Ailstock*, 546 F.2d at 1290." *United States* v. *Terry*, 729 F.2d 1063 (6th Cir. 1984), at page 1070.

charge and by forcing him to defend on that charge, he was deprived of the ability to make arguments and request rulings which, had they been made within the context of a permitted trial, could have resulted in a verdict more favorable to him than that which was the product of the barred trial, as modified.

To assume that all of these trial decisions can be made at the appellate level where the judge(s) has been exposed to evidence prejudicial to the accused and of which he would be ignorant had the decisions been made in the defendant's favor at trial; and to further assume, that under such exposure, the judge(s) would do fully as much in identifying, researching and arguing issues as would counsel whose sole devotion is to the cause of his client, is to assume too much. Such assumptions put the defense of the accused in the hands of the judge, and are inconsistent with the adversary process, and with trial by jury.[86]

The questions thus generated implicate concerns related to the effective assistance of counsel, the right to trial before an impartial judge, and the rights to grand jury indictment, trial by jury, and due process of law, as well as double jeopardy. Also implicated are the rights to confrontation and compulsory process to the extent that resolution of evidentiary issues might require, at trial, that hearings be conducted on motions to suppress evidence, motions in limine, motions for the production of exculpatory material, and so forth.

Ohio is doing more here than simply suggesting that it had theories under which some of this evidence, or evidence which *Ohio* considers significant, would have been

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86 "We are not authorized to look at the printed record, resolve conflicting evidence, and reach the conclusion that the error was harmless because we think the defendant was guilty. That would be to substitute our judgment for that of the jury and, under our system of justice, juries alone have been entrusted with that responsibil.ty." *Weiler* v. *United States*, 323 U.S. 606 (1945); p. 611.

admitted. Ohio is further suggesting that in every respect possibly significant to the outcome of a permitted trial, those theories would have been adopted. For the sake of argument, respondent assumes that Ohio is entirely capable of representing that had the trial been conducted on a jeopardy permitted charge, its own strategy, tactical decisions, evidentiary presentation, arguments, jury instruction requests, etc., would have remained the same. Ohio is in no position to say, however, that in all of those and other respects the defense would have remained the same had a jeopardy permitted trial been conducted; nor that the court's decisions at a permitted trial would not have changed in consideration of the absence of an element of the offense. Accordingly, it is speculation to suggest that the outcome of a jeopardy permitted trial could not possibly have been more favorable to the respondent than the verdict here, as modified.

When there is a question as to whether an individual is guilty or innocent of a criminal charge which might properly be brought against him, our judicial system provides a way of resolving the dispute. Trial. A fair trial on a jeopardy permitted charge is all that James Mathews has been seeking since August of 1978. The decision of the Sixth Circuit Court of Appeals ordering that the Writ be granted unless such a trial take place, should be affirmed.

CONCLUSION

For reasons set forth above, respondent respectfully requests of the Court that the decision of the United States Court of Appeals for the Sixth Circuit, be affirmed.

Respectfully submitted,

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